DOCKET

No. 13-1428	***CAPITAL CASE***
Title:	Ron Davis, Acting Warden, Petitioner
	v.
	Hector Ayala
Docketed:	May 29, 2014
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Nos.:	(09-99005)
Decision Date:	February 25, 2014

Questions Presented

---Date---	-------Proceedings and Orders----------
May 27 2014	Petition for a writ of certioran filed. (Response due June 30, 2014)
Jun 18 2014	Order extending time to file response to petition to and including July 30, 2014.
Jul 21 2014	Order further extending time to file response to petition to and including August 13, 2014.
Aug 13 2014	Brief of respondent Hector Ayala in opposition filed.
Aug 26 2014	Reply of petitioner Kevin Chappell, Warden filed.
Aug 27 2014	DISTRIBUTED for Conference of September 29, 2014.
Oct 6 2014	DISTRIBUTED for Conference of October 10, 2014.
Oct 14 2014	DISTRIBUTED for Conference of October 17, 2014.
Oct 20 2014	Petition GRANTED In addition to the question presented by the petition, the parties are directed to brief and argue the following question: "Whether the court of appeals properly applied the standard articulated in Brecht v. Abrahamson, 507 U.S. 619 (1993)."
Oct 30 2014	The time to file the joint appendix and petitioner's brief on the merits is extended to and including December 11, 2014.
Oct 30 2014	The time to file respondent's brief on the merits is extended to and including January 20, 2015.
Dec 9 2014	Joint appendix filed. (Statement of costs filed)
Dec 9 2014	Brief of petitioner Kevin Chappell, Warden filed.
Dec 22 2014	SET FOR ARGUMENT ON Tuesday, March 3, 2015
Dec 22 2014	Record requested from U.S.C.A. 9th Circuit.
Dec 22 2014	Record from U.S.C.A. 9th Circuit is electronic and located on PACER.
Jan 7 2015	CIRCULATED.
Jan 9 2015	Record received from U.S.D.C. Southern District of California, (12 Boxes, one box of the record is SEALED)
Jan 20 2015	Brief of respondent Hector Ayala filed. (Distributed)
Feb 12 2015	Letter from counsel for the petitioner regarding change in party name.
Feb 18 2015	Reply of petitioner Ron Davis, Acting Warden filed. (Distributed)

Mar 3 2015	Argued. For petitioner: Robin Urbanski, California Deputy Attorney General, San Diego, Cal. For respondent: Anthony J. Dain, San Diego, Cal.
Jun 18 2015	Judgment REVERSED and case REMANDED. Alito, J., delivered the opinion of the Court, in which Roberts, C. J., and Scalia, Kennedy, and Thomas, JJ., joined. Kennedy, J., and Thomas, J., filed concurring opinions. Sotomayor, J., filed a dissenting opinion, in which Ginsburg, Breyer, and Kagan, JJ., joined.

PETITION FOR WRIT OF CERTIORARI

No. 13-1428

In the Supreme Court of the United States

KEVIN CHAPPELL, WARDEN, *Petitioner,*

v.

HECTOR AYALA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Whether a state court's rejection of a claim of federal constitutional error on the ground that any error, if one occurred, was harmless beyond a reasonable doubt is an "adjudicat[ion] on the merits" within the meaning of 28 U.S.C. § 2254(d), so that a federal court may set aside the resulting final state conviction only if the defendant can satisfy the restrictive standards imposed by that provision.

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PETITION FOR A WRIT OF CERTIORARI

The Attorney General of California, on behalf of Warden Kevin Chappell, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.[1]

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-121a) is not yet officially reported, but may be found at 2014 U.S. App. LEXIS 3699 and 2014 WL 707162. An earlier version of the court's opinion, before amendment on denial of rehearing en banc, was reported at 730 F.3d 831. The opinion of the district court (App. 122a-171a) is unpublished. The opinion of the California Supreme Court on direct appeal of the underlying state case (App. 189a-261a) is reported at 24 Cal. 4th 243.

JURISDICTION

The judgment of the court of appeals was originally entered on September 13, 2013. The court amended its opinion and reentered judgment on February 25, 2014, in conjunction with the entry of an order denying rehearing or rehearing en banc. App. 1a, 172a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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[1] Kevin Chappell has succeeded Robert Wong as warden of the state prison in which respondent is incarcerated. Warden Chappell is substituted as the named petitioner in this case in compliance with this Court's Rule 35.3.

STATUTORY PROVISION INVOLVED

Section 2254 of Title 28 of the United States Code, as amended by the Antiterrorism and Effective Death Penalty Act (AEDPA), provides in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT

1. In 1989, respondent Hector Ayala was tried for the execution-style murders of three men during an attempted robbery in 1985. *See* App. 2a, 189a-196a. Jury selection took more than three months. *Id.* at 3a.

In three motions pursuant to *People* v. *Wheeler*, 22 Cal. 3d 258 (1978)—California's equivalent to *Batson* v. *Kentucky*, 476 U.S. 79 (1986)—defense counsel objected to the prosecutor's use of seven peremptory challenges to exclude minority jurors. App. 3a-4a & n.1. When the court asked the prosecutor to explain his reasons for the challenges, the prosecutor said he would prefer to provide them *ex parte*, so as not to divulge matters of trial strategy. *Id.* at 196a-197a. Over a defense objection to being excluded from any

discussion that did not actually involve such matters, the trial court permitted the *ex parte* proffer of the prosecution's explanations. *Id.* at 197a. Based on those proceedings, the court ultimately concluded that the prosecutor had not made his challenges on the basis of race. *Id.*

The jury convicted respondent of three counts of first degree murder, one count of attempted murder, one count of robbery, and three counts of attempted robbery. It also found two special circumstances—multiple murder and murder in the attempted commission of robbery—and returned a verdict of death as to each count of murder. The trial court entered judgment consistent with that verdict on November 30, 1989. App. 190a.

2. The California Supreme Court affirmed. App. 189a-261a. Among other things, respondent challenged the trial court's use of *ex parte* hearings to receive the prosecutor's explanations for his peremptory challenges. *See id.* at 196a-212a. In describing the legal framework applicable to that claim, the court cited both *Batson* and *Wheeler*. *E.g.*, *id.* at 197a-198a. It observed that, apart from the general framework established by *Batson*, "no particular procedures are constitutionally required," and specifically noted this Court's statement that it "'remain[ed] for the trial courts to develop rules'" for the appropriate handling of *Batson* challenges "'without unnecessary disruption of the jury selection process.'" *Id.* at 198a (quoting *Powers* v. *Ohio*, 499 U.S. 400, 416 (1991)). It then held that, "as a matter of state law," the trial court erred by excluding the defense from *Wheeler/Batson* hearings where, in fact, "no matters of trial strategy were revealed." *Id.* at 200a; *see id.* at 199a-203a.

The court then conducted an extensive, independent review of the record to determine

whether the error it had identified was prejudicial. App. 203a-212a. In the end it concluded "that the error was harmless under state law (*People* v. *Watson*, 46 Cal. 2d 818, 836, 299 P.2d 243 (1956)), and that, if federal error occurred, it, too, was harmless beyond a reasonable doubt (*Chapman* v. *California*, 386 U.S. 18, 24 (1967)) as a matter of federal law." *Id.* at 203a.

In its review, the court carefully considered the record as to each prospective juror struck by the prosecution. As to venire member Olanders D., the prosecutor had noted that D.'s jury questionnaire said that he opposed capital punishment. App. 203a. Although D. indicated his views had changed over the years, the prosecutor believed he was not being entirely responsive to the questions posed by either party, and that he would not "fit in" on the jury. The Supreme Court noted that the trial court had disagreed on the last point, believing Olanders D. might well get along with other jurors, but found the other proffered reasons accurate and supported by the record. *Id.* at 203a-204a.

As to Galileo S., the court noted the prosecutor's explanation that S.'s answers during voir dire on attitudes toward the death penalty revealed that he was "a nonconformist person who has had numerous run-in's with the law." App. 204a. Also, government records indicated three or four arrests beyond those that S. had admitted. The prosecutor summarized: "[H]is attitude is such that I think it would create alienation and hostility on the part of the other jurors." The trial court agreed with the prosecutor, observing that Galileo S. exhibited a "paranoia ... concerning the justice system." The Supreme Court's independent review of the record "tend[ed] to confirm some of these observations," including "a somewhat flippant attitude in responding to various questions during general voir dire." *Id.* & n.1.

As to prospective juror Barbara S., the court discussed the prosecutor's observations that he believed her responses to questions were extremely slow, causing the prosecutor to suspect she was under the influence of drugs. App. 204a. She had "an empty look in her eyes, slow responses, a lack of really being totally in tune with what was going on." The prosecutor believed S.'s answers did not make sense and that she lacked the ability to communicate effectively during the questioning process. He also believed that she appeared angry. The Supreme Court noted that the trial court disagreed on the last point, interpreting her demeanor as reflecting nervousness rather than hostility. Otherwise, however, the trial court "certainly [could not] quarrel" with the prosecutor's impressions or with his decision to challenge S. *Id.* at 204a-205a.

As to Geraldo O., the court noted the prosecutor's explanation that O. had difficulty in reading, writing, and understanding English, that his dress and behavior were not like the other prospective jurors, and that he appeared to be "aloof" from other prospective jurors. App. 205a. The prosecutor also expressed concern about O.'s inability to express any opinion about the death penalty. The trial court had agreed that the record supported the prosecutor's assessment, and the Supreme Court's own review likewise tended to confirm it. *Id.* & n.2.

Regarding prospective juror George S., the Supreme Court discussed the prosecutor's initial belief that the prospective juror was Greek and not Hispanic. App. 176a. Additionally, the prosecutor felt "extremely uneasy" about the fact that George S. was the sole "holdout" on a prior jury as well as with his voir dire responses concerning the death penalty. Also causing the prosecutor concern was the fact that the George S. had applied to be a police officer and

was rejected, which the prosecutor feared might have been for psychological reasons. App. 205a-206a. The trial court confirmed that each of these observations was accurate. *Id.* at 206.

As to Luis M., the court noted the prosecutor's concerns that he was hesitant about the death penalty and had admitted asking about the defendant in his neighborhood and otherwise personally investigating the case. The trial court had agreed that the prosecutor properly exercised a peremptory challenge on these grounds. App. 206a.

Finally, as to prospective juror Robert M., the court observed that the prosecutor had initially passed on challenges, leaving Robert M. on the panel. Ultimately, the prosecutor decided to challenge M. because he doubted M. could actually impose the death penalty. The trial court agreed that although M.'s questionnaire indicated he was supportive of the death penalty, his answers were equivocal as to whether he could actually impose it. The trial court found this to be a permissible basis upon which to exercise a peremptory challenge. App. 206a-207a.

In light of its thorough review of the record, the Supreme Court summarized the evidence supporting a conclusion that the prosecutor had not exercised his strikes for discriminatory reasons. App. 207a. It further noted that the trial court's rulings following each *ex parte* hearing "indisputably reflect both its familiarity with the record of voir dire of the challenged prospective jurors and its critical assessment of the prosecutor's proffered justifications." *Id.* at 207a-208a. To the extent the trial court endorsed the prosecutor's characterizations of prospective jurors and their responses, that provided support for the court's "implicit conclusion that the prosecutor did not fabricate his justifications and that they were grounded in fact." *Id.* at 208a. On

balance, the state reviewing court was left "confident that the prosecutor was not violating *Wheeler*, and that defense counsel's presence could not have affected the outcome of the *Wheeler* hearings." *Id.* at 207a. And while it recognized that there was a possibility, "in the abstract," that the record might have been different if defense counsel had been present, it refused to "reverse the judgment on the basis of speculation regarding theoretical possibilities of th[at] type[.]" *Id.* at 209a.

3. In 2002, respondent filed a federal petition for habeas corpus, raising (among other issues) the same claim that the trial court's exclusion of him and his counsel from the hearings during which the prosecutor explained his reasons for challenging the seven prospective jurors violated his federal constitutional rights. App. 124a, 130a-133a.

The district court first held that it was not clearly established at the time respondent's conviction became final whether a defendant had a federal constitutional right to have counsel participate in a *Batson* hearing. *See* App. 132a. The court thus concluded that relief based on some of respondent's arguments would require applying a new rule of federal criminal procedure, which would be barred by *Teague* v. *Lane*, 489 U.S. 288 (1989). App. 127a-132a.

Alternatively, the district court held that respondent could not satisfy an exception to the relitigation bar imposed by AEDPA, 28 U.S.C. 2254(d). App. 133a-148a. As particularly relevant here, the court noted that, in *Batson*, this Court specifically left it to the lower courts to "'formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges.'" App. 143a (quoting *Batson*, 476 U.S. at 99 & fn. 24). It looked to decisions from the Sixth and Seventh Circuit Courts of Appeals, holding that a trial

court does not err in excluding the defense from a prosecutor's explanation for exercising peremptory challenges. *Id.* (citing *United States* v. *Tucker*, 836 F.2d 334, 337-340 (7th Cir. 1988), and *United States* v. *Davis*, 809 F.2d 1194, 1201-1202 (6th Cir. 1987)). The court also noted this Court's decision in *Georgia* v. *McCollum*, 505 U.S. 42, 58 (1992), which stated that "'[i]n the rare case in which the explanation for a challenge would entail confidential communications or reveal trial strategy, an *in camera* discussion can be arranged.'" *Id.* at 143a-144a.

In light of these authorities, the district court "doubt[ed] whether the trial court's procedure was constitutionally defective as a matter of clearly established federal law." *Id.* at 145a. In any event, the court concluded that respondent could not establish a right to relief under § 2254(d), because the state Supreme Court's decision that any federal error was harmless was neither contrary to, nor an unreasonable application of, clearly established federal law. App. 145a; *see id.* at 145a-148a.

4. A divided panel of the Ninth Circuit reversed and remanded, with instructions to the district court to grant federal habeas relief. App. 1a-121a.

a. At the outset of its analysis, the court acknowledged that respondent's habeas petition is subject to AEDPA (App. 9a), which requires deference to a state court's adjudication of the merits of a claim unless the state court decision "was contrary to, or an unreasonable application of, clearly established Federal law" as determined by this Court, or "based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d). The court recognized this Court's decision in *Harrington* v. *Richter*, 131 S. Ct. 770 (2011) (*Richter*), holding "'[w]hen a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court

adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary.'" App. 13a (quoting *Richter*, 131 S. Ct. at 784). It likewise acknowledged this Court's decision in *Johnson* v. *Williams*, 133 S. Ct. 1088 (2013) (*Williams*), holding "'[w]hen a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits—but that presumption can in some circumstances be limited.' " App. 14a (quoting *Williams*, 133 S. Ct. at 1096).

The court concluded, however, that the *Williams* presumption did not apply to respondent's *Batson*-related claim; and that, even if it did, it had been rebutted by the state court's opinion. App. 14a-15a. It reasoned that the California Supreme Court's opinion could support only two interpretations. One was that the court must have silently found federal constitutional error, because it held there was state error and its decision included discussion of cases concluding that there had been federal error. *Id.* at 14a-17a. Alternatively, the state court might have decided that there was nothing to be gained from reaching the federal constitutional issue, because it had already decided that any error was harmless under both the state and federal standards. In either situation, the Ninth Circuit concluded, the presumption that the state court had adjudicated respondent's federal claim "on the merits" would be rebutted. *Id.* at 17a-18a.

b. Proceeding to review respondent's claim *de novo*, the court of appeals held that excluding the defense from the prosecutor's *Batson* proffer was both unconstitutional and prejudicial. App. 23a-55a.

As to error, the court held that the question was controlled by its own prior precedent dealing with

federal proceedings. *Id.* at 24a (citing *United States* v. *Thompson*, 827 F.2d 1254 (9th Cir. 1987). As to prejudice, the court undertook its own juror-by-juror review of the record (*see* App. 34a-45a), and ultimately concluded that "constitutional error on the part of the state likely prevented Ayala from showing that the prosecution utilized its peremptory challenges in a racially discriminatory manner" (*id.* at 70a-71a). Perceiving "substantial reason to question the motivation of the prosecution in engaging in its peremptory challenges" (*id.* at 33a), the court concluded it was "probable that the state's errors precluded Ayala from turning what is a very plausible *Batson* claim—the challenge to the prosecution's strikes of all minority jurors—into a winning one" by preventing defense counsel from identifying where the prosecutor's reasons might have been pretextual and from making a better record of related facts or arguments to support respondent's claim (*id.* at 35a).

c. Judge Callahan dissented. App. 71a-121a. She first agreed with the district court that respondent's *Batson* claim was not an available basis for relief on federal habeas under *Teague* v. *Lane*, because this Court "specifically declined 'to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges'" and the federal courts of appeals had adopted divergent views on the question of *ex parte* proceedings, so that a rule requiring the presence of the defendant and his counsel at a *Batson* hearing was not "dictated by precedent" when respondent's conviction became final. *Id.* at 72a-80a (citing *Caspari* v. *Bohlen*, 510 U.S. 383, 390 (1994)).

Judge Callahan further reasoned that by holding that if federal error occurred it was harmless beyond a reasonable doubt the state Supreme Court had implicitly rejected respondent's claim of federal

constitutional error. App. 80a. Alternatively, the state court had "clearly addressed Ayala's federal claim in determining that whatever federal error occurred, it was harmless as a matter of federal law." *Id.* at 70a. Accordingly, Judge Callahan concluded, the state court's judgment must be accorded full deference under § 2254(d). *Id.* at 80a-81a (citing *Williams*, 133 S. Ct. at 1094).

Judge Callahan reasoned that, even if it were debatable whether the state court implicitly rejected respondent's underlying claim, the court's analysis made clear that it was aware of the federal claim, and *Richter* and *Williams* thus required federal habeas courts to accept that the state court had adjudicated the claim on the merits. App. 86a-89a. Observing that the "majority's dislike for AEDPA drives it to try to avoid its provisions" (*id.* at 81a), Judge Callahan identified two flaws in the majority's analysis: (1) it was "contrary to [this Court's] opinions directing that any question as to whether a state court considered a constitutional issue is to be resolved in favor of finding that it did" (*id.*, citing *Johnson*, 133 S. Ct. at 1094-1096, and *Richter*, 131 S. Ct. at 784-785), and (2) "by separating the California Supreme Court's determination of *Batson/Wheeler* error from its adjudication of the federal claim, the majority evade[d] giving the opinion the deference demanded by AEDPA and [this] Court" (*id.* at 81a-82a (footnote omitted)).

Judge Callahan also explained that, because fairminded jurists could disagree on the matter of harmlessness, by definition there could be no "grave doubt" as to the harmlessness of any federal constitutional error in this case. App. 97a. She observed that, primarily relying on a Ninth Circuit decision, the majority improperly used the *Brecht* standard in order to justify *de novo* review of the

prejudice question. *Id.* at 90a-97a. Conversely, Judge Callahan relied on this Court's decisions in *Richter*, 131 S. Ct. at 785-786, and *Felkner* v. *Jackson*, 131 S. Ct. 1305 (2011), for the proposition that when a state court denies a federal claim on harmless error grounds, that too is a decision entitled to deference, unless the petitioner can establish one of the exceptions to the relitigation bar in §2254(d). App. 91a-93a, 97a-99a.

d. The Ninth Circuit denied the State's petition for rehearing en banc. App. 172a. Eight judges dissented from that decision, with a written opinion by Judge Ikuta. App. 172a-188a. The dissenters read the California Supreme Court's opinion to have resolved Ayala's federal constitutional claim against him by discussing this Court's decisions in *Batson* and *Powers* v. *Ohio*, 499 U.S. 400, and noting that this Court has never required any particular procedures in conducting a *Batson* inquiry, expressly leaving the development of such procedures to trial courts. App. 174a-175a. Judge Ikuta reasoned that the state court only reinforced the rejection of Ayala's *Batson* claim by holding any potential federal error to be harmless. App. 177a, 178a.

In any event, Judge Ikuta explained that it did not matter whether one could read the state court's opinion to have declined to reach the underlying constitutional issue, because this Court has never intimated that a state court's denial of a federal claim on harmless-error grounds is not a merits denial, thus authorizing a federal habeas court to review the underlying claim *de novo*. App. 181a. She criticized the panel majority for creating another path to *de novo* review because this Court "has not yet *directly* told us that we must defer to a state court decision holding that any potential federal constitutional error was harmless." App. 173a, original emphasis.

Because a harmless-error denial is a denial of relief on substantive grounds, rather than procedural ones, the dissenters maintained that a state court's decision that any federal error was harmless is an adjudication on the merits entitled to full respect under AEDPA. App. 182a. Indeed, the panel's decision to the contrary created a circuit conflict. App. 182a-183a.

Finally, Judge Ikuta disagreed with the panel majority's application of the *Brecht* prejudice standard, arguing that it contradicted this Court's decision in *Fry* v. *Pliler*, 551 U.S. 112 (2007). App. 184a-185a. She observed that if a state court's harmless error determination under *Chapman* is not unreasonable, then there can be no prejudice under *Brecht*, given *Fry*'s reasoning that "*Brecht* 'obviously subsumes' AEDPA/*Chapman* review." *Id.* at 185a-186a. In the dissenters' view, the California Supreme Court's determination that any *Batson* error in this case was harmless beyond a reasonable doubt was not an unreasonable application of *Chapman*. *Id.* at 186a.

REASONS FOR GRANTING CERTIORARI

On the direct appeal of respondent's murder conviction, the California Supreme Court held that the trial court committed state-law error by permitting the prosecutor to articulate race-neutral justifications for his peremptory strikes of minority jurors outside the presence of respondent and his lawyer. App. 200a. After carefully reviewing the record, the court concluded that the error was harmless on the facts of this particular case. App. 203a-212a. As to respondent's parallel federal claim, the court noted that this Court had expressly declined to prescribe specific procedures for implementing the requirements of *Batson* v. *Kentucky*, 476 U.S. 79, and that lower courts had reached different conclusions concerning whether it was federal constitutional error

to receive a prosecutor's explanations for peremptory strikes *ex parte*. App. 198a, 201a-203a. Based on the same evaluation of the record that it conducted for state-law purposes, the court resolved the claim by holding that any federal error that might have occurred was likewise harmless beyond a reasonable doubt. App. 203a, 210a, 211a. Having concluded that neither the state nor the federal claim provided a basis for relief, the court entered a judgment affirming respondent's conviction. App. 245a.

Fourteen years later, a sharply divided panel of the Ninth Circuit undertook to evaluate respondent's federal *Batson* claim *de novo*. App. 22a, 23a-24a. It justified that approach by holding that the California Supreme Court's determination that any federal error was clearly harmless was not an "adjudicat[ion]" of respondent's federal claim "on the merits" for purposes of triggering the restrictions on federal habeas review of state criminal judgments imposed by 28 U.S.C. § 2254(d). *See, e.g.*, App. 9a & n.3, 11a, 12a & n.4, 16a-17a, 22a-23a. That holding departs from this Court's teachings concerning the proper application of § 2254(d), and creates a conflict in the circuits on an issue that will arise in many cases. Moreover, after improperly addressing respondent's legal arguments *de novo*, the court also proceeded to conduct a *de novo* harmless-error analysis, in which it simply disagreed with the state trial and appellate courts' assessment of the record. This Court should grant review to resolve the conflict and to ensure that the Ninth Circuit's approach does not fundamentally undercut Congress's direction that federal courts may set aside state criminal judgments on collateral review only when they can be shown to be "contrary to, or [based on] an unreasonable application of, clearly established Federal law, as determined by the

Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

1. Section 2254(d)'s restrictions on federal habeas review apply to any federal "claim" that was "adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d). This Court has held that "[w]hen a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state law procedural principles to the contrary." *Richter*, 131 S. Ct. at 784-785. The same is true when a defendant raises a federal claim and the state court denies relief with an opinion that expressly addresses some claims, but not the one later presented for federal habeas review. *Williams*, 133 S. Ct. at 1094-1096. "When a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits" (*id.* at 1096)—subject to rebuttal of the presumption in some "unusual circumstances" (*id.*), such as where "the evidence leads very clearly to the conclusion that a federal claim was inadvertently overlooked" (*id.* at 1097). The principal question in this case is whether a federal claim has been "adjudicated on the merits" for purposes of AEDPA where the state court adverts to and addresses the claim, but its only clear holding is that "*if* federal error occurred, it ... was harmless beyond a reasonable doubt as a matter of federal law." App. 203a (emphasis added; citation omitted); *see also id.* at 211a, 213a.

The answer to that question follows from this Court's decisions. To begin with, it is clear that the California Supreme Court actually "adjudicated" respondent's federal claim. That court expressly noted the existence of a claim under *Batson*, along

with the largely parallel state claim under *People* v. *Wheeler*, 22 Cal. 3d 258 (*see* App. 196a); discussed the state and federal claims together (App. 196a-212a); noted that this Court had specifically left it to trial courts to develop related procedures, resulting in "a rather wide spectrum" of responses (including "'those that permit the prosecutor's explanation to be received in camera and ex parte'") (App. 198a-199a); held that the procedure followed in respondent's case was error as a matter of *state* law (App. 200a); repeatedly held that "if federal error occurred, it, too, was harmless beyond a reasonable doubt" (App. 203a; *id.* at 211a, 213a); and entered a judgment denying any relief. There is no possibility that respondent's federal claim was "inadvertently overlooked." *See Williams*, 133 S. Ct. at 1097.

The state court's adjudication was also "on the merits." In *Williams*, this Court explained that "as used in this context, the word 'merits' is defined as '[t]he intrinsic rights and wrongs of a case as determined by matters of substance, in distinction from matters of form.'" 133 S. Ct. at 1097 (emphasis omitted). A non-merits adjudication would be one based on matters "extraneous" to the particular claim, "such as the competence of the tribunal or the like," or on "procedural details" or "technicalities." *Id.* (internal quotation marks omitted). In this framework, a determination that a particular claim of error, even if otherwise well-founded, would not warrant relief, because any error would not have affected the substantive outcome of the proceeding, is an evaluation "based on the intrinsic right and wrong of the matter." *Id.* It is not a matter of threshold jurisdiction, procedural bar, or other "technicalit[y]" separate from the intrinsic merits of the defendant's claim. *Cf. Gonzalez* v. *Crosby*, 545 U.S. 524, 532 & n.4 (2005) (distinguishing, in a related context, between a

determination "that there exist or do not exist grounds entitling a petitioner to habeas corpus relief" and "a denial for such reasons as failure to exhaust, procedural default, or statute of limitations bar"); *see also Williams*, 133 S. Ct. at 1103 (Scalia, J., concurring in the judgment).

That conclusion comports with the Court's other AEDPA decisions. As the Ninth Circuit observed in this case, rejecting a claim on harmless-error grounds "is not an unusual practice." App. 18a; *see also id.* at 183a (Ikuta, J., dissenting from denial of rehearing en banc) (state courts "routinely" resolve federal claims on harmless-error grounds). Decisions in which a state court denies relief without stating its reasons, or without expressly addressing a particular federal claim, will thus commonly involve claims denied on that basis. This Court has made clear that, in those situations, there is a "strong ... presumption" that any federal claim properly presented to the state court was "adjudicated on the merits" within the meaning of Section 2254(d). *Williams*, 133 S. Ct. at 1096; *Richter*, 131 S. Ct. at 784-785. In discussing how that presumption might be overcome, the Court has noted that it might be clear in a particular case a state court treated a claim as procedurally barred, or simply overlooked it. It has never suggested that, as the Ninth Circuit held here (*see* App. 17a-18a), a state court's rejection of a federal claim could be treated as not "on the merits" for AEDPA purposes because it was based on a determination that any error was clearly harmless. Nor would such a broad exception to the general rule be consistent with this Court's many cases construing and applying AEDPA, which have consistently emphasized that a state court judgment may not be set aside unless it reaches a result that is demonstrably inconsistent with some square holding of this Court. *See, e.g.*, *White* v. *Woodall*, 134 S. Ct.

1697, 1702 (2014); *Early* v. *Packer*, 537 U.S. 3, 8 (2002) (validity of state judgment "does not even require *awareness* of our cases [by the state court], so long as neither the reasoning nor the result of the state-court decision contradicts them").

The California Supreme Court's determination that any federal error "was harmless beyond a reasonable doubt ... as a matter of federal law" (App. 203a) thus rejected respondent's federal claims "on the merits" for purposes of Section 2254(d). Federal habeas review should accordingly have been limited to determining whether respondent could show that the ultimate denial of relief "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" (28 U.S.C. § 2254(d)(1)). That burden was not reduced by the fact that the state court did not state any definitive conclusion about whether there was federal error—any more than it would have been if the court had said nothing about the federal claim at all. *See Richter*, 131 S. Ct. at 784 ("§ 2254 applies when a 'claim,' not a component of one, has been adjudicated"). Rather, respondent was required to show that, taking his federal claim as a whole, and without regard for what the state court might have said or thought about any particular aspect of the claim, there was "no reasonable basis for the state court to deny relief." *Id.* That is, AEDPA did not permit the Ninth Circuit to set aside the California Supreme Court's judgment unless respondent could demonstrate that there was "no possibility fairminded jurists could disagree that the state court's decision conflict[ed] with this Court's precedents." *Id.* at 786.

If the Ninth Circuit had applied that standard in this case, it could not have granted relief. As the California Supreme Court explained in its opinion,

this Court expressly left it to trial courts to develop particular procedures for implementing *Batson*'s constitutional requirements; and the lower courts adopted a "'wide spectrum'" of approaches, including permitting prosecutors to present explanations for their strikes *ex parte*, as was done here. App. 198a (citing *Powers* v. *Ohio*, 499 U.S. 400, 416, and quoting *Gray* v. *State*, 317 Md. 250, 257 (1989)); *id.* at 201a (citing cases from the Sixth and Seventh Circuits for the proposition that "some decisions have tolerated an ex parte *Batson* hearing procedure on the ground that the United States Constitution permits it"). Although the state Supreme Court concluded that the better practice was to permit *ex parte* proceedings only for compelling reasons not present here, and adopted that rule as a matter of state law, it clearly was not *compelled* to reach that result by any decision of this Court. *Cf.* App. 54a-67a (concluding for purposes of *Teague* v. *Lane*, 489 U.S. 288, only that rule was "established" as a matter of *Ninth Circuit* law, *id.* at 54a-59a, or based on a "confluence of *Batson* and th[is] Court's Sixth Amendment jurisprudence," *id.* at 64); *id.* at 76a-80a (Callahan, J., dissenting) (agreeing with district court that rule was not "'dictated by precedent'" for purposes of *Teague*).[2] And without

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[2] Under Section 2254(d), "clearly established ... as determined by" this Court "refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *Lockyer* v. *Andrade*, 538 U.S. 63, 71 (2003); *see also, e.g.*, *Carey* v. *Musladin*, 549 U.S. 70, 74 (2006). A "specific" legal rule may not be inferred from this Court's decisions; rather, the Court must have "squarely" established the rule. *Richter*, 131 S. Ct. at 786; *Knowles* v. *Mirzayance*, 556 U.S. 111 (2009). Where the Court's "cases give no clear answer to the question presented, let alone one in [the accused's] favor, it cannot be said that the state court unreasonabl[y] appli[ed] clearly established Federal law" by rejecting a federal claim.

(continued...)

such compulsion, the state court's judgment denying relief on respondent's federal claim could not be set aside later by a federal habeas court as "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 131 S. Ct. at 786-787.

2. The Ninth Circuit reached a contrary result only by refusing to honor the state court's judgment as an "adjudicat[ion] on the merits" for purposes of AEDPA (App. 10a-23a); reviewing respondent's federal claim *de novo*, and holding that his trial was marred by federal constitutional error (*id.* at 23a-27a); and then conducting its own review of the record and deciding, again *de novo*, that the error was prejudicial (*id.* at 27a-53a). These departures from proper federal habeas review under AEDPA warrant review and correction by this Court.

a. First, the Ninth Circuit's decision that rejection of a federal claim solely on harmless-error grounds is not an adjudication "on the merits," and thus permits a federal habeas court to review the claim *de novo*, conflicts squarely with the Tenth Circuit's decision in *Littlejohn* v. *Trammell*, 704 F.3d 817, 850 n.17 (10th Cir. 2013). *See also* App. 182a-183a (Ikuta, J., dissenting from denial of rehearing en banc). In *Littlejohn*, the state court on direct appeal had noted the opposing arguments regarding one of the defendant's federal claims. In the end, however, it did not rule one way or the other on whether there was

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(...continued)
Wright v. *Van Patten*, 552 U.S. 120, 126 (2008) (*per curiam*). Here, as the California Supreme Court recognized, no decision of this Court established any specific rule forbidding trial courts from receiving *ex parte* explanations for a prosecutor's peremptory challenges.

error, but rejected the claim only on the ground that "even assuming, arguendo, that Littlejohn's prior trial testimony should have been suppressed, any error stemming from its admission was harmless beyond a reasonable doubt[.]" *Littlejohn* v. *State*, 85 P.3d 287, 298 (Ok. Ct. Crim. App. 2004); *see Littlejohn*, 704 F.3d at 848. In his federal habeas proceeding, Littlejohn argued that, because the state court assumed there was federal error, AEDPA did not require the federal court to consider whether his claim was based on "clearly established federal law." 704 F.3d at 850 n.17; *compare* App. 21a-33a (holding that because the California Supreme Court either accepted respondent's argument that there was federal error or did not decide that question, the federal court had "no reason to give § 2254(d) deference to such a holding in evaluating Ayala's claim"). The Tenth Circuit rejected that argument:

> Where a state court assumes a constitutional violation in order to address whether the defendant was actually harmed by the violation, as here, the state court takes the claim on the merits; it just disposes of it on alternative *merits*-based reasoning. *Cf. Brown* v. *Luebbers*, 371 F.3d 458, 462-463 (8th Cir. 2004) (holding that AEDPA deference applied to a state court's alternative holding where it assumed a trial error and applied harmless error review under *Chapman*). That is, it renders a decision that is on the merits for purposes of AEDPA, see *Richter*, 131 S. Ct. at 784; therefore, our inquiry must adhere to the analytical framework of AEDPA, which includes an assay into whether there is clearly established federal law.

704 F.3d at 850 n.17. Undertaking that inquiry, the court held that no decision of this Court "furnished

the [state court] with clearly established federal law to resolve Mr. Littlejohn's argument," and that there was therefore no basis for federal habeas relief. *Id.* at 850-851.

The result and reasoning in *Littlejohn* cannot be reconciled with those of the Ninth Circuit panel majority in this case. Indeed, Judge Ikuta pointed out this conflict in her 8-judge dissent from the denial of rehearing en banc. App. 182a-183a. Tellingly, the panel's 67-page opinion, although amended in other respects on the denial of rehearing, offers no response.

b. Second, as Judge Ikuta's dissent also points out (App. 183a), the Ninth Circuit's holding that federal habeas courts may (indeed, must) review *de novo* any federal claim that a state court resolved on harmless-error grounds "is not a case-specific error that will be confined to the facts of this opinion." State courts in the Ninth Circuit, as elsewhere, "routinely resolve claims of federal error on the basis that any potential error was harmless." *Id.* Under the Ninth Circuit's approach, *de novo* federal review under AEDPA will no longer be limited to "those rare cases when a state court decides a federal claim in a way that is 'contrary to' clearly established Supreme Court precedent," or the perhaps even rarer cases where some evidence "leads very clearly to the conclusion that a federal claim was inadvertently overlooked." *Williams*, 133 S. Ct. at 1097; *see also, e.g.*, *Richter*, 131 S. Ct. at 786 ("If this standard is difficult to meet, that is because it was meant to be."). Rather, federal courts, at least in the Ninth Circuit, will now have frequent occasion to consider for themselves, on the basis of cold state records, whether a state trial involved federal constitutional error—and then, if they find error, to try to assess whether it was harmless, "'without regard for the state court's harmlessness determination.'" App. 31a-32a (quoting *Pulido* v.

Chrones, 629 F.3d 1007, 1012 (9th Cir. 2010)); *see also Dixon* v. *Williams*, No. 10-17145, slip op. 15, 2014 WL 1687819 (9th Cir. Apr. 30, 2014) (quoting this language from *Ayala* and granting habeas relief, reversing district court's determination that state Supreme Court's denial of relief should be respected under AEDPA).

The only way for state courts to avoid this result would be to take care to address questions of federal error expressly in every case—even where it would otherwise be possible and efficient to reject a particular defendant's claim on harmless-error grounds. But any such rule would complicate the processing of routine cases by state courts that must sensibly allocate finite judicial resources. It would run directly counter to the usual principle that courts should *not* unnecessarily reach often-complex constitutional questions. *See, e.g.*, App. 18a-19a (acknowledging that avoiding unnecessary resolution of constitutional questions is a "good reason" for state courts to resolve federal claims on harmless-error grounds). And it would improperly turn AEDPA into a prescription for how state courts should frame their opinions and judgments. *See Richter*, 131 S. Ct. at 757.

None of this is an appropriate way of construing or implementing AEDPA. On the contrary, if allowed to proceed, the Ninth Circuit's new regime will permit a broad and rapid undermining of "AEDPA's deferential architecture," which was intended to "leav[e] 'primary responsibility' for adjudicating federal claims to the States." *Williams*, 133 S. Ct. at 1097 (quoting *Woodford* v. *Visciotti*, 537 U.S. 19, 27 (2002) (*per curiam*).

c. Finally, even if there had been any warrant under AEDPA for the Ninth Circuit to reach its own conclusion that there was federal error at

respondent's trial and then proceed to consider whether that error was harmless, the way in which the court conducted its harmless-error inquiry cannot be reconciled with the basic principles of deference to state court judgments that Congress sought to impose through AEDPA.

In *Mitchell* v. *Esparza*, 540 U.S. 12 (2003), this Court held that, when a state appellate court finds federal constitutional error harmless beyond a reasonable doubt under *Chapman*, a federal court may not set aside the resulting judgment unless the state court's determination was objectively unreasonable. In *Fry* v. *Pliler*, 551 U.S. at 119-121, the Court held that that deferential standard of collateral review is "obviously subsume[d]" by the "actual prejudice" standard of *Brecht* v. *Abrahamson*, 507 U.S. 619, 638 (1993), which the Court viewed as allowing federal habeas courts *less* scope for setting aside state judgments. *See id.* at 119 (emphasizing the Court's "frequent recognition that AEDPA limited rather than expanded the availability of [federal] habeas relief"). Reiterating concerns raised in *Brecht* itself regarding the finality of state court judgments and the difficulty of retrying defendants many years after their crimes were committed, the Court again stressed that "'[s]tate courts are fully qualified to identify constitutional error and evaluate its prejudicial effects on the trial process,'" and indeed "'often occupy a superior vantage point from which to evaluate the effect of trial error.'" *Id.* at 118 (quoting *Brecht*, 507 U.S. at 636.)

Since *Fry*, the courts of appeals have struggled to arrive at an appropriate understanding of how to apply *Brecht* review to harmless-error questions under AEDPA. *Compare, e.g.*, *Merolillo* v. *Yates*, 663 F.3d 444, 454 (9th Cir. 2011) (no deference to state court determination), *cert. denied*, 133 S. Ct. 102 (2012),

and *Jones* v. *Basinger*, 635 F.3d 1030, 1052, n.8 (7th Cir. 2011) (where error caused "actual prejudice" under Brecht, state court's application of *Chapman* was clearly unreasonable), with, *e.g.*, *Cudjo* v. *Ayers*, 698 F.3d 752, 768 (9th Cir. 2012) (federal habeas court must apply AEDPA deference to state court *Chapman* determination), and *Kamlager* v. *Pollard*, 715 F.3d 1010, 1016 (7th Cir. 2013) (if state court has conducted harmless-error analysis, federal habeas court must decide whether that analysis was objectively unreasonable); *Johnson* v. *Acevedo*, 572 F.3d 398, 404 (7th Cir. 2009) (same). And the Ninth Circuit's decision in this case is a good example of how this Court's decision in *Fry* is often applied, in practice, to set aside state judgments without any regard for the reasonableness of the state court's analysis of the harmless-error question. *See, e.g.*, App. 31a-32a ("We apply the *Brecht* test without regard for the state court's harmlessness determination." (internal quotation marks omitted; citing *Fry*).

On direct appeal in respondent's case, the California Supreme Court conducted its own thorough review of the reasons proffered by the prosecutor for challenging the prospective jurors at issue and the underlying record materials, taking account as well of the trial court's demonstrated careful engagement in the process and critical evaluation of the prosecutor's explanations as they were offered. *See* App. 203a-212a. Whatever conclusion a different group of judges might come to based on their own analysis, the state court's assessment was not unreasonable—even as an application of *Chapman*'s standard of harmlessness beyond a reasonable doubt, and *a fortiori* as a question of whether there was more likely than not any "actual prejudice" to the defendant. Yet, rather than giving any regard to the careful evaluation and

conclusion of their state colleagues, the Ninth Circuit panel majority in this case engaged in a putative *Brecht* analysis that "piles speculation upon speculation" to reach a contrary result. App. 186a (Ikuta, J., dissenting from denial of rehearing en banc); *see id.* at 184a-188a & n.5; *see also* App. 106a-119a (Callahan, J., dissenting) (reviewing evidence concerning individual jurors and concluding (at 119a) that "[t]he California Supreme Court may not have been compelled to conclude that 'the challenged jurors were excluded for proper, race-neutral reasons,' ... [b]ut its conclusion was objectively reasonable").

Such wholly non-deferential second-guessing of reasonable determinations by state courts, particularly on the record-, fact-, and context-intensive question of evaluating the potential for prejudice from possible errors in state court trial proceedings, cannot be what this Court intended in *Fry*—or what Congress intended when it enacted AEDPA. A state criminal conviction may not properly be set aside simply because two federal appellate judges would, on *de novo* consideration, reach a different conclusion from their state court counterparts concerning whether a particular alleged error was potentially prejudicial. Indeed, the fundamental flaw in the Ninth Circuit's approach is aptly highlighted by the renewed applicability of an observation that this Court made in *Richter*: "Here, it is not apparent how the Court of Appeals' analysis would have been any different without AEDPA." 131 S. Ct. at 786.

In order for appropriate AEDPA deference to be in fact "subsume[d]" by use of the *Brecht* standard, as *Fry* envisioned, application of that standard must involve something other than the wholly *de novo*, avowedly *non*-deferential harmlessness review engaged in by the panel majority in this case.

Otherwise, rather than being *subsumed*, AEDPA's critical limitations on the mere relitigation of claims in federal court will have been effectively *supplanted*. Accordingly, the Court should also grant review to make clear that, if the court of appeals properly reached the question of harmlessness at all, its "lengthy opinion ... discloses an improper understanding of § 2254(d)'s unreasonableness standard and of its operation in the context of" assessing a state court's considered conclusion that any federal error that may have occurred was clearly harmless.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HECTOR JUAN AYALA, Petitioner-Appellant,

v.

ROBERT K. WONG, Warden, Respondent-Appellee.

No. 09-99005

D.C. No. 3:01-CV-01322-IEG-PLC

Appeal from the United States District Court
for the Southern District of California

AMENDED OPINION

REINHARDT, Circuit Judge:

State prisoner Hector Juan Ayala ("Ayala") appeals the denial of his petition for a writ of habeas corpus. During the selection of the jury that convicted Ayala and sentenced him to death, the prosecution used its peremptory challenges to strike all of the black and Hispanic jurors available for challenge. The trial judge concluded that Ayala had established a prima facie case of racial discrimination under *Batson v. Kentucky*, 476 U.S. 79 (1986), but permitted the prosecution to give its justifications for the challenges of these jurors in an in camera hearing from which Ayala and his counsel were excluded. The trial judge then accepted the prosecution's justifications for its strikes without disclosing them to the defense or permitting it to respond. The California Supreme Court held that the trial court erred as a matter of state law, relying on a number of federal cases, but found that any error—

state or federal—was "harmless."

We conduct our review of Ayala's appeal under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). In reviewing Ayala's federal claim, the state court faced two questions: first, whether the exclusion of Ayala and his counsel from the ex parte *Batson* proceedings was federal constitutional error, and, second, whether any such error was harmless. We conclude that the state court either resolved the first question in Ayala's favor or did not reach it. We therefore apply de novo review, and conclude that there was federal constitutional error. Turning to the second question, harmlessness, we conclude that the state court found that any federal constitutional error was harmless. We review that determination under *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993), and conclude that the violation of Ayala's *Batson* rights was prejudicial. We therefore remand with instructions to grant the writ.

I.

On April 26, 1985, Jose Luis Rositas, Marcos Antonio Zamora, and Ernesto Dominguez Mendez were shot and killed in the garage of an automobile repair shop in San Diego, California. A fourth victim, Pedro Castillo, was shot in the back but managed to escape alive. Castillo identified Ayala, his brother Ronaldo Ayala, and Jose Moreno as the shooters. He claimed that these men had intended to rob the deceased, who ran a heroin distribution business out of the repair shop.

Ayala was subsequently charged with three counts of murder, one count of attempted murder, one count of robbery and three counts of attempted robbery. The information further alleged that the

special circumstances of multiple murder and murder in the attempted commission of robberies were applicable in his case. A finding that one of these special circumstances was true was required in order for Ayala to be eligible for the death penalty.

Jury selection began in San Diego in January 1989. Each of the more than 200 potential jurors who responded to the summons and survived hardship screening was directed to fill out a 77-question, 17-page questionnaire. Over the next three months, the court and the parties interviewed each of the prospective jurors regarding his or her ability to follow the law, utilizing the questionnaires as starting points for their inquiry. Those jurors who had not been dismissed for cause were called back for general voir dire, at which smaller groups of jurors were questioned by both the prosecution and the defense. The parties winnowed the remaining group down to twelve seated jurors and six alternates through the use of peremptory challenges. Each side was allotted twenty peremptory challenges which could be used upon any of the twelve jurors then positioned to serve on the jury. After twelve seated jurors were finally selected, both parties were allotted an additional six peremptory challenges to be used in the selection of alternates.

The prosecution employed seven of the 18 peremptory challenges it used in the selection of the seated jurors to dismiss each black or Hispanic prospective juror who was available for challenge, resulting in a jury that was devoid of any members of these ethnic groups. In response, Ayala, who is Hispanic, brought three separate motions pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), claiming that the prosecution was systematically excluding

minority jurors on the basis of race.[1]

The defense made its first *Batson* motion after the prosecution challenged two black jurors. The trial court found that the defense had not yet established a prima facie case of racial discrimination, but nevertheless determined that it would require the prosecution to state its reasons for challenging the jurors in question. At the prosecutor's insistence, and despite the defense's objections, the court refused to let the defendant or his counsel be present at the hearing in which the prosecution set forth these reasons and the court determined whether they were legitimate.

The trial judge continued to employ this ex parte, in camera procedure to hear and consider the prosecutor's purported reasons for challenging minority jurors following the defense's second and third *Batson* motions. He did so despite his determination, by the third motion, that the defense had established a prima facie showing of racial discrimination.

Ultimately, the trial judge concluded that the prosecutor had proffered plausible race-neutral reasons for the exclusion of each of the seven minority jurors, and denied the defense's *Batson* motions. Although the ex parte *Batson* proceedings were transcribed, this transcript—and thus, the prosecution's proffered race-neutral reasons for

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[1] The motions were technically made under *People v. Wheeler*, 22 Cal.3d 258 (1978), the California analogue to *Batson*. Because "a *Wheeler* motion serves as an implicit *Batson* objection," we characterize Ayala's motions, and the proceedings that followed, as being pursuant to *Batson*. *Crittenden v. Ayers*, 624 F.3d 943, 951 (9th Cir. 2010).

striking the seven black and Hispanic jurors — were not made available to Ayala and his counsel until after the conclusion of the trial.

The jury convicted Ayala of all counts save a single attempted robbery count, and found true the special circumstance allegations. At the penalty phase, it returned a verdict of death.

Early in the process of jury selection, the trial judge had instructed the parties to return to the court all the questionnaires the prospective jurors had completed, and advised them that he would be "keeping the originals." At some point during or following the trial, however, all questionnaires, save those of the twelve sitting jurors and five alternates, were lost. The questionnaires of four additional jurors — including the sixth alternate — were located in the defense counsel's files, but the remaining 193 questionnaires have never been located.

On direct appeal from his conviction, Ayala challenged the trial court's use of ex parte *Batson* proceedings. He also claimed that the loss of the jury questionnaires deprived him of his right to a meaningful appeal of the denial of his *Batson* motion. A divided California Supreme Court upheld his conviction on the basis of harmless error and also upheld the sentence. *People v. Ayala*, 24 Cal. 4th 243 (Cal. 2000). The court unanimously held that under state law the trial judge had erred in conducting the *Batson* proceedings ex parte. *Id.* at 204 (majority opinion); *id.* at 291 (George, C.J., dissenting). A majority went on to hold, however, that any error was harmless beyond a reasonable doubt. *Id.* at 204. It also concluded that the loss of the questionnaires was harmless beyond a reasonable doubt. *Id.* at 208.

In dissent, Chief Justice George, joined by Justice Kennard, expressed his disagreement with the majority's "unprecedented conclusion that the erroneous exclusion of the defense from a crucial portion of jury selection proceedings may be deemed harmless." *Id.* at 221 (George, C.J., dissenting). Ayala's petition for certiorari was denied by the United States Supreme Court on May 14, 2001. *Ayala v. California*, 532 U.S. 1029 (2001).

Ayala timely filed his federal habeas petition. The district court denied relief, but issued a Certificate of Appealability as to Ayala's *Batson*-related claims and his claim that the state had violated his Vienna Convention right to consular notification.[2] Ayala now appeals.

II.

In order for this court to grant Ayala habeas relief, we must find that he suffered a violation of his federal constitutional rights. To do so, Ayala must demonstrate both that (1) the state court committed federal constitutional error and (2) that he was prejudiced as a result. We discuss the issue of error in Part III and the issue of prejudice in Part IV.

Here, Ayala alleges two federal constitutional violations, the first of which is the principal focus of this opinion. Ayala's primary claim relates to his exclusion and his counsel's from the *Batson* proceedings. Ayala's secondary claim, which exacerbates the overall error in this case, relates to the state court's loss of the juror questionnaires prior

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[2] Because we conclude that Ayala is entitled to relief on his *Batson*-related claims, we need not decide whether the district court erred in rejecting his Vienna Convention claim.

to Ayala's appeal. We discuss these errors separately, in Sections III.A and III.B respectively, devoting much greater attention to the first, although the second would strongly bolster the first.

The state, in defending against the grant of habeas relief to Ayala, makes two principal arguments. First, it contends that Ayala was not prejudiced by his exclusion or his counsel's from the *Batson* proceedings, or by the loss of the juror questionnaires. This was the state court's basis for denying Ayala relief.

Second, the state raises a procedural objection that Ayala's claim regarding his exclusion during the *Batson* proceedings is barred by *Teague v. Lane*, 489 U.S. 288 (1989). "[I]n addition to performing any analysis required by AEDPA, a federal court considering a habeas petition must conduct a threshold *Teague* analysis when the issue is properly raised by the state." *Horn v. Banks*, 536 U.S. 266, 272 (2002). We conduct the requisite *Teague* analysis in Part V of this opinion.

In Part VI of this opinion, we respond to arguments made by the dissent, and in Part VII we set forth our conclusion and remand to the district court with instructions to grant Ayala the writ of habeas corpus.

III.

As stated above, Ayala alleges that the state court committed two distinct federal constitutional errors. The first alleged error relates to the state court's exclusion of Ayala and his counsel from the *Batson* proceedings (referred to sometimes in this opinion as the "ex parte *Batson* proceedings"). The second error relates to the state court's loss of the juror

questionnaires. We address each error in turn, concluding that Ayala is correct and that the state court committed both federal constitutional errors, although we hold that the first error is sufficient in itself to warrant the issuance of the writ, and the second simply bolsters the first.

A.

"For more than a century, [the Supreme] Court consistently and repeatedly has reaffirmed that racial discrimination by the State injury selection offends the Equal Protection Clause." *Georgia v. McCollum*, 505 U.S. 42, 44 (1992). *Batson* established the three-step inquiry used to determine whether this basic constitutional guarantee has been violated. First, the defendant must make a prima facie showing that the prosecution has exercised peremptory challenges in a racially discriminatory manner. *Batson*, 476 U.S. at 96. Such a showing may be made, as the trial judge concluded it was in Ayala's case, where the prosecution has engaged in a pattern of strikes against jurors of a particular race. *Id.* at 97. Second, once the defendant has made a prima facie showing, "the burden shifts to the State to come forward with a neutral explanation for challenging" the jurors. *Id.* Third, the trial court must then determine whether, taking into consideration the prosecutor's explanations for his conduct, "the defendant has established purposeful discrimination." *Id.* at 98.

Ayala contends that the exclusion of the defense from the proceedings in which the prosecution justified its strikes of the seven black and Hispanic jurors, and the trial court accepted those justifications, violated his right to the assistance of counsel and his right to be personally present and to

assist in his defense. He further contends that these errors prevented him from ensuring that the prosecution did not violate his fundamental right to a jury chosen free from racial discrimination.

Before we may evaluate the merits of Ayala's contention, we must first determine the appropriate standard of review to apply. Specifically, because Ayala's habeas petition is subject to the requirements of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), *see Kennedy v. Lockyer*, 379 F.3d 1041, 1046 (9th Cir. 2004), we must determine whether Ayala's claim of federal constitutional error was adjudicated on the merits, and if so what the nature of that adjudication was.[3] We do so in Section III.A.1, concluding that the California Supreme Court did not find against Ayala on the merits of his claim of federal constitutional error, and therefore § 2254(d) does not require deference to such a

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[3] "By its terms § 2254(d) bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in §§ 2254(d)(1) and (d)(2)." *Harrington v. Richter*, 131 S. Ct. 770, 784 (2011). Accordingly, if the California Supreme Court made an "adjudication on the merits" that the exclusion of Ayala and his counsel from his *Batson* proceedings was not erroneous under federal constitutional law, then Ayala would not be entitled to relief on his claim unless that state court adjudication

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

determination. We then conclude in Section III.A.2 that, under de novo review, Ayala's constitutional rights were violated when he and his counsel were excluded from stages two and three of the *Batson* proceedings.

1.

The first question is whether the state court made an adjudication on the merits as to whether the exclusion of Ayala and his counsel from the *Batson* proceedings was federal constitutional error. Answering that question is significantly more difficult in this case than in most federal habeas appeals. We are confronted with an especially unclear state court decision that requires us to delve more deeply than is typical into the question of what the state court did or did not "adjudicate on the merits" the question of constitutional error. The California Supreme Court, when confronted with Ayala's claim, concluded that the exclusion of the defense from these proceedings was, in fact, erroneous as a matter of state law. The state court began its analysis by stating the legal framework for Ayala's challenge. It identified the three-step process for a *Batson* challenge and noted that, under *Batson*, no particular procedures were required. *Ayala*, 6 P.3d at 202. It then made three distinct legal determinations. First, it found that "no matters of trial strategy were revealed" during the *Batson* proceedings in Ayala's case. *Id.* at 202-03. Second, it held "as a matter of state law" that it was "error to exclude defendant from participating in the hearings on his [Batson] motions." *Id.* at 203. The California Supreme Court observed that "it seems to be almost universally recognized that ex parte proceedings following a [*Batson*] motion ... should not be

conducted unless compelling reasons justify them." *Id.* at 203. Because no matters of trial strategy were revealed here and thus no such "compelling reasons" existed, the state court "concluded that error occurred under state law." *Id.* at 204. Third, turning to the question of prejudice (a subject we discuss in Part IV), the state court

> conclude[d] that the error was harmless under state law (*People v. Watson* (1956) 46 Cal.2d 818, 836, 299 P.2d 243), and that, if federal error occurred, it, too, was harmless beyond a reasonable doubt (*Chapman v. California* (1967) 386 U.S. 18, 24, 87 S. Ct. 824, 17 L.Ed.2d 705) as a matter of federal law.

Id; *see also id.* at 204-08 (analyzing prejudice further). Having found error but having also deemed it harmless, the state court denied Ayala relief.

There is no doubt that the California Supreme Court found that the exclusion of Ayala and his counsel from the *Batson* proceedings was erroneous under state law. The state court made no express finding with respect to whether the exclusion of Ayala and his counsel from the *Batson* proceedings was also error under federal constitutional law. Although it is not easy to interpret a state court's silence, there are only three possible determinations it could have made in this case. The California Supreme Court either

> (1) held that there was error under federal constitutional law;
>
> (2) did not decide whether there was error under federal constitutional law; or

(3) held that there was no error under federal constitutional law.

[hereinafter discussed as Options 1, 2, and 3 respectively]

Of these three possibilities, only under Option 3 — in which the state court made an unfavorable determination on the merits of Ayala's claim of federal constitutional error—would § 2254(d) require deference to a determination against Ayala.[4] Thus,

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[4] Under Option 1, i.e., if the California Supreme Court found error under federal constitutional law, as well as under state law, an argument can be made that we would be required to accord AEDPA deference to that determination. That is, we could be required to give AEDPA deference *in favor of* the petitioner. An argument can also be made that § 2254(d), by its text and purpose, is inapplicable to a claim on which the petitioner prevailed in state court, and therefore the claim should be reviewed de novo. Finally, because habeas review is intended to provide relief to a prisoner and not to the state, an argument can be made that a state court's determination in favor of petitioner cannot be relitigated on habeas review. The question whether to accord AEDPA deference to a state court determination favorable to a petitioner, review that determination de novo or not review it at all is a question of first impression that we need not decide in this case. In all three situations—de novo review, AEDPA deference in favor of the petitioner, or no review—we would conclude that there was federal constitutional error in Ayala's trial. See discussion *infra* Part III(A)(2).

Under Option 2, i.e., if the California Supreme Court found error with respect to the *Batson* issue as a matter of state law only and did not decide the question of federal constitutional error on the merits, our review would be de novo. *See Cone v. Bell*, 556 U.S. 449, 472 (2009) (reviewing de novo because the "[state] courts did not reach the merits of [the petitioner's constitutional] claim"); *Lott v. Trammell*, 705 F.3d 1167, 1218 (10th Cir. 2013); *Harris v. Thompson*, 698 F.3d 609, 624 (7th Cir. 2012). A decision "as a matter of state law only" perforce does not constitute an "adjudication on the merits" of a

(continued...)

we need determine only whether the California Supreme Court's silence is best interpreted as Option 3—i.e., as holding that the exclusion of Ayala and his counsel from the *Batson* proceedings was *not* erroneous under federal constitutional law.

In determining how to interpret state court silence on the question of federal constitutional error, we consider, inter alia, two recent Supreme Court decisions: *Richter*, 131 S. Ct. 770, and *Johnson v. Williams*, 133 S. Ct. 1088 (2013). In both *Richter* and *Williams*, the Supreme Court applied a rebuttable presumption that, even though the state court was silent with respect to a fairly presented federal claim, the claim was adjudicated on the merits. The Court's rationale was that, because the state court denied relief overall, it necessarily adjudicated (and rejected) the federal claim. For example, in the context of a summary denial, as in *Richter*, the state court could not have denied relief overall without having rejected, and thus adjudicated, every fairly presented federal claim. Accordingly, the Supreme Court held, "[w]hen a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Richter*, 131 S. Ct. at 784. The same was true when, in *Williams*, the state court rejected a state law claim, was silent with respect to a fairly presented federal claim, and denied relief overall. *See Williams*, 133 S. Ct. at 1091. There too, the state court could not have denied relief overall without having

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(...continued)
federal claim, and therefore § 2254(d) would not apply.

rejected, and thus adjudicated, the federal claim presented by the petitioner. Thus, the Supreme Court held, "[w]hen a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits—but that presumption can in some limited circumstances be rebutted." *Id.* at 1096 (discussing *Richter*). Here, the presumption is inapplicable for several reasons. We need mention only a couple. First, it was not necessary for the state court to reject the claim of federal constitutional error on the merits in order for it to deny relief to the petitioner. To the contrary, the state court denied Ayala relief on his federal constitutional claim only because it concluded that the error (if any) was harmless. Second, the facts of this case dictate the conclusion that the California Supreme Court believed that the error under state law also constituted federal constitutional error.

We believe that there are only two plausible interpretations of the California Supreme Court's decision—either Option 1 or Option 2. The most likely interpretation is Option 1, i.e., that the California Supreme Court held implicitly that there was error under state law *and* under federal constitutional law alike. Notably, the California Supreme Court based its determination that the trial court's exclusion of Ayala and his counsel was impermissible "as a matter of state law," *Ayala*, 6 P.3d at 203, on the fact that it was "almost universally recognized" that ex parte *Batson* proceedings are erroneous absent a compelling reason, expressly relying for this conclusion on multiple federal cases that themselves relied on federal constitutional law. *Id.* (citing *United States v. Roan Eagle*, 867 F.2d 436, 441 (8th Cir. 1989); *United*

States v. Garrison, 849 F.2d 103, 106 (4th Cir. 1988); *United States v. Gordon*, 817 F.2d 1538, 1541 (11th Cir. 1987)). The court then quoted extensively from United *States v. Thompson*, 827 F.2d 1254 (9th Cir. 1987), in which we held that the ex parte proceedings in that case violated federal constitutional law. *Ayala*, 6 P.3d at 203-04. In summarizing its discussion of error (before moving to prejudice), the California Supreme Court stated: "We have concluded that error occurred under state law, and we have noted *Thompson*'s suggestion that excluding the defense from a [*Balson*]-type hearing may amount to a denial of due process." *Id.* at 204. The obvious message here is that the California Supreme Court believed that the federal constitutional issue should be decided the same way as the state law issue. This is consistent with the fact that California courts interpret a violation of *Wheeler* — California's state equivalent of *Batson* — as proof of a violation of *Batson*. *See People v. Yeoman*, 72 P.3d 1166, 1187 (Cal. 2003); *see also Johnson v. California*, 545 U.S. 162 (2005) (holding that *Wheeler* is more demanding than *Batson*). Thus, if we were required to determine whether the California Supreme Court adjudicated Ayala's claim of federal constitutional error on its merits in favor of the petitioner or the state, we would hold without question that the California Supreme Court found error in petitioner's favor under both state law *and* federal constitutional law—i.e., Option 1.

In support of this conclusion, we find instructive—and likely dispositive—the Supreme Court's discussion in Part III of *Williams*. In that case, the petitioner challenged the dismissal of a holdout juror under both California state law and under the Sixth Amendment right to a fair jury. The

California Court of Appeal found that there was no error under state law. It did not expressly decide petitioner's federal constitutional claim but, in the course of deciding the state law claim, cited a California Supreme Court case, *People v. Cleveland*, 21 P.3d 1225 (Cal. 2001). *Cleveland* in turn discussed three federal appellate cases in depth, each of which was based on the Sixth Amendment. In *Williams*, the Supreme Court explained *Cleveland* as follows:

> *Cleveland* did not expressly purport to decide a federal constitutional question, but its discussion of [the federal cases] shows that the California Supreme Court understood itself to be deciding a question with federal constitutional dimensions. *See* 25 Cal.4th, at 487, 106 Cal. Rptr. 2d 313, 21 P.3d, at 1239 (Werdegar, J., concurring) (emphasizing importance of careful appellate review in juror discharge cases in light of the "constitutional dimension to the problem").

Williams, 133 S. Ct. at 1098. A unanimous Supreme Court then concluded that because the state court found no error under state law on the basis in part of federal cases relying on federal constitutional law, it likewise found no error using that same analysis to decide the question under federal constitutional law. *Id.* at 1098-99. The obverse is necessarily true with respect to the state court's analysis in this case. The California Supreme Court, in finding that the exclusion of Ayala and his counsel from the *Batson* proceedings *was* erroneous under state law, cited to multiple federal cases relying on federal law. It did not expressly purport to decide the federal constitutional question, but it too must have

understood itself to be deciding a question with federal constitutional dimensions and to be deciding it in petitioner's favor by its reliance on cases that held analogous conduct to be erroneous under the federal Constitution. Thus, if we were compelled to determine whether the California Supreme Court adjudicated Ayala's claim of federal constitutional error on its merits in favor of the petitioner or the state, we would hold without the slightest hesitation that it found that the error occurred under federal constitutional law—i.e., Option 1. Accordingly, if we apply § 2254(d) at all, we defer to a holding that there *was* federal constitutional error, deference that favors Ayala. *See* discussion *supra* at 31 n. 4.

Alternatively, we are willing to assume another, albeit weaker, interpretation of the California Supreme Court's decision that leads to the same result. Under that interpretation, the state court did not, deliberately or otherwise, decide whether there was error under federal law, i.e., Option 2 above. In short, it failed to decide the merits of the question of federal constitutional error because it thought there was nothing to be gained by doing so. It had already decided that the state court had erred on state law grounds and nothing further was to be gained by holding that it was also a federal constitutional error. *Richter* and *Williams* instruct us to afford a rebuttable presumption that a fairly presented claim was "adjudicated on the merits" for purposes of § 2254(d), but this presumption is rebuttable if there is "any indication or state-law procedural principles" supporting the conclusion that the state court did not adjudicate the federal claim on the merits. *Richter*, 131 S. Ct. at 784-85. Here, the California Supreme Court denied Ayala relief overall but did so by (1) finding that the trial court committed error on state

law grounds, (2) failing to make any express determination of error on federal constitutional grounds, and (3) finding any error harmless under *both* the state and federal standards for harmless error. In the context of these holdings, the rebuttable presumption that *Richter* and *Williams* instruct us to afford is, in fact, rebutted. The California Supreme Court, by finding any alleged error harmless under both the state and federal standards for harmless error, had no reason to reach the question of whether federal constitutional error occurred. This is not an unusual practice; courts often choose not to decide the question whether an error occurred by deciding that any error was harmless. Indeed, we have found no published opinion in which, after a state court has denied relief based on harmless error, a federal court has presumed that the state court adjudicated the merits of the question of error.

In fact, the California Supreme Court would have had good reason not to decide the merits of the issue of federal constitutional error here. "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that [courts] ought not to pass on questions of constitutionality ... unless such adjudication is unavoidable." *Clinton v. Jones*, 520 U.S. 681, 690 n.11 (1997) (quoting *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 105 (1944)). Moreover, where the intersection of state law and federal constitutional law is complex, a state court may very well prefer to decide only the state law claim and not reach a federal constitutional question. The California Supreme Court, by finding error under state law, determined the question of error conclusively. This served the purpose of providing guidance to the lower state courts. Finding that the

state law error also constituted federal constitutional error (or did not) would, however, have served no purpose, once the state court determined that any error was harmless. (The state court was free to decide the issues presented in whatever order it chose.) Indeed, respect for state judges requires recognizing that a state court's silence with respect to a fairly presented federal claim may be intentional and prudent.

Our reasoning finds support in a different line of Supreme Court cases, in which the Court has interpreted state court silence with regard to a particular issue as not constituting an "adjudication on the merits." Many of these cases involved claims of ineffective assistance of counsel brought under *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* claims have two prongs, deficiency of counsel's performance and prejudice to the defendant; failure on either prong is dispositive. *Id.* at 680. Accordingly, state courts frequently decide *Strickland* claims by rejecting either deficiency or prejudice and remain silent with respect to the other prong. When these claims are raised in federal habeas proceedings, the Supreme Court has repeatedly interpreted that silence as a failure to reach the other prong and therefore *not* an "adjudication on the merits" of it. *See Wiggins v. Smith*, 539 U.S. 510, 534 (2003) ("Our review is not circumscribed by a state court conclusion with respect to prejudice, as neither of the state courts below reached this prong of the *Strickland* analysis." (emphasis added)); *Rompilla v. Beard*, 545 U.S. 374, 390 (2005) ("Because the state courts found the representation adequate, *they never reached the issue* of prejudice, and so we examine this element of the *Strickland* claim de novo." (emphasis added)

(internal citations omitted)); *Porter v. McCollum*, 130 S. Ct. 447, 452 (2009) ("Because the state court *did not decide* whether Porter's counsel was deficient, we review this element of Porter's *Strickland* claim de novo." (emphasis added)). Nor has the Supreme Court limited this reasoning to Strickland claims. In *Cone v. Bell*, 556 U.S. 449 (2009), the petitioner raised a claim under *Brady v. Maryland*, 373 U.S. 83 (1963), in his federal habeas petition. The state habeas court dismissed the claim based on a factual determination that the Supreme Court held was erroneous. *Id.* at 466-69. Turning to the merits of the claim, the Supreme Court stated:

> Because the Tennessee courts *did not reach* the merits of Cone's *Brady* claim, federal habeas review is not subject to the deferential standard that applies under AEDPA to "any claim that was adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d). Instead, the claim is reviewed de novo. *See, e.g., Rompilla v. Beard*, 545 U.S. 374, 390, 125 S. Ct. 2456, 162 L.Ed.2d 360 (2005) (de novo review where state courts did not reach prejudice prong under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984)); *Wiggins v. Smith*, 539 U.S. 510, 534, 123 S. Ct. 2527, 156 L.Ed.2d 471 (2003) (same).

Id. at 472 (emphasis added). Again, even though the state court was silent with respect to the merits of Cone's *Brady* claim, the Supreme Court did not presume that the claim was adjudicated on the merits. Thus, as *Wiggins*, *Rompilla*, *Porter*, and *Cone* demonstrate, and as both *Richter* and *Williams* have

recognized, in some instances, a state court's silence with respect to a part of a claim should not be interpreted as an "adjudication on the merits" on that part for purposes of § 2254(d).

We summarize the law as set forth by the Supreme Court as follows. There are circumstances in which, even if a state court has denied relief overall, a state court's silence with respect to a fairly presented federal issue cannot be interpreted as an "adjudication on the merits" of that issue for purposes of § 2254(d), because the rebuttable presumption cited in *Richter* and *Williams* is rebutted by the legal principles involved (including the principle of constitutional avoidance) and factual context applicable to a particular case. *See Wiggins v. Smith*, 539 U.S. at 534; *Rompilla v. Beard*, 545 U.S. at 390; *Porter v. McCollum*, 130 S. Ct. 447, 452 (2009); *Cone v. Bell*, 556 U.S. at 472.

This is such a case. As explained earlier, the California Supreme Court had no reason to reach Ayala's federal constitutional claim once it had decided that (1) the alleged error occurred as a matter of state law, (2) the error was harmless under the state and federal standards for harmless error, and (3) whether or not that occurrence also violated federal constitutional law was of no consequence. Furthermore, under long established legal principles, the California Supreme Court had every reason not to decide unnecessarily a question of federal constitutional law. Thus, we find merit in Option 2, i.e., that the California Supreme Court did not decide whether there was error under federal constitutional law.

We recognize that it remains unclear whether the California Supreme Court decision is better read as

Option 1 or Option 2.[5] What is clear is that Option 3—i.e., that the California Supreme Court held that, although there was error under state law, there was none under federal constitutional law—is *not* the best, or even a plausible reading of the state court opinion. [6] In this case, because the California Supreme Court found error under state law by citing to federal cases relying on federal law *and* because it "noted" that there might have been a violation of federal law, *Ayala*, 6 P.3d at 202-04, Option 3 is a wholly implausible reading of the California Supreme Court decision.[7] Accordingly, we have no reason to

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[5] The dissent therefore misstates our holding when it claims we have "decide[d] that the California Supreme Court did not determine whether there was error under federal law." Dissent at 98. That is only one of two holdings we find possible; the other is that the Supreme Court decided that there was federal constitutional error for the same reasons that there was state constitutional error. It follows that it is also not true that we have concluded, as the dissent claims, that there is "no reason" to give the California Supreme Court decision § 2254(d) deference. As explained *supra* at 31 n. 4, if the California Supreme Court held that there *was* federal constitutional error — Option 1 — we might give this holding § 2254(d) deference, although the question of what level of deference to afford a finding *in favor* of petitioner is a question of first impression that we need not decide here.

[6] In other words, because *Wheeler* is *Batson*-plus, and because its *Wheeler* holding relied on *Batson* case law, it is impossible that the California Supreme Court found no *Batson* error on the merits while finding *Wheeler* error on the merits. It either found *Batson* error or did not reach the federal claim. Therefore, there is either no merits decision demanding deference or a merits decision *favoring Ayala*. The latter possibility is unchartered territory, but, regardless, we review under a standard no less favorable to Ayala than de novo.

[7] Even the dissent struggles to argue that Option 3 is the best reading. First, it states that the California Supreme Court "rejected" Ayala's federal claim. Dissent at 97. Then,

(continued...)

give § 2254(d) deference to such a holding in evaluating Ayala's claim. (As noted *supra* in Part II, we will discuss in Part IV the question whether the California Supreme Court's determination that any error was harmless was erroneous.)

2.

Having determined that only Options 1 and 2 are plausible readings of the California Supreme Court

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(...continued)
suddenly less confident, the dissent argues only that "[t]here may be some question as to whether the California Supreme Court actually found that there was federal error." *Id.* Finally, backing away from its original claim even more, the dissent seems to endorse Option 1, suggesting that the Supreme Court found that there *was* federal constitutional error: "The California Supreme Court's evaluation of the *Batson/Wheeler* issue was clear and concise. It held that 'it was error to exclude defendant from participating in the hearings on the *Wheeler* motions.'" Dissent at 99 (citing *Ayala*, 6 P.3d at 203). The dissent accuses us of "admitting" that the California Supreme Court cited both *Batson* and *Thompson* in making this "clear" finding of *Wheeler* error. *Id.* (citing *Ayala*, P.3d at 203). Of course we admit this; our argument is that *because* the California Supreme Court cited *Batson* and *Thompson* in finding state constitutional error, the court likely found federal constitutional error as well. It is the dissent's position that is perplexing: while acknowledging that the California Supreme Court cited federal cases in holding for Ayala on his claim of state constitutional error, it concludes that the court "implicitly reject[ed]" Ayala's federal constitutional error claim. Dissent at 99-100. Given *Williams*'s instruction that a state court's citation to federal cases in deciding a state claim "shows that [it] underst[ands] itself to be deciding a question with federal constitutional dimensions," and given that the federal cases the California Supreme Court cited deemed analogous conduct to constitute federal constitutional error, the dissent's reading that these same cases compel the conclusion that the conduct here is *not* federal constitutional error makes little sense. *See Williams*, 133 S. Ct. at 1098.

decision, we proceed to review de novo Ayala's claim that his exclusion from stages two and three of the *Batson* proceedings violated the federal constitution.[8]

Under de novo review, it is clear that it was federal constitutional error to exclude both Ayala and his counsel from stages two and three of the *Batson* proceedings. As the California Supreme Court recognized, our circuit had already held in *United States v. Thompson*, 827 F.2d 1254 (9th Cir. 1987) that, in the absence of a "compelling justification" (e.g., the disclosure of trial strategy) for conducting ex parte *Batson* proceedings, such exclusions violate federal constitutional law. *Id.* at 1258-59. Here, the California Supreme Court concluded — and neither party to this appeal disputes — that there was no such compelling justification for conducting ex parte *Batson* proceedings, as "no matters of trial strategy were revealed" by the prosecutor. *Ayala*, 6 P.3d 193at 261-62. As such, Ayala's claim is controlled by *Thompson*, and we conclude that federal constitutional error occurred when Ayala and his lawyer were excluded from stages two and three of the *Batson* proceedings.[9]

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[8] As discussed *supra* at 31 fn. 4, there are three possible standards of review that could apply to the California Supreme Court's decision on federal constitutional error. Because, under the circumstances of this case, de novo review is the most searching of the three, we need not review the decision under the other two standards.

[9] Part of our reason for brevity in our analysis of Ayala's claim under de novo review is that his case is clearly controlled by *Thompson*. Another reason is that our analysis in Part V, in which we reject the state's *Teague* argument, explains further why Ayala suffered a constitutional violation in this case.

B.

Ayala also claims that the state's loss of an overwhelming majority of the jury questionnaires deprived him of a record adequate for appeal and thus violated his federal due process rights. Although less clear than with Ayala's first federal constitutional claim, the California Supreme Court also decided this claim on the basis of harmless error only. *Ayala*, 6 P.3d 193, 24 Cal. 4th at 270 ("Thus, even if there was federal error, it was harmless beyond a reasonable doubt."). Accordingly, for the reasons explained *supra* Section III.A.1, we proceed with de novo review.

As the California Supreme Court recognized, Ayala has a due process right to a record sufficient to allow him a fair and full appeal of his conviction. *Id.* at 208 (citing *People v. Alvarez*, 14 Cal. 4th 155, 196 n.8 (1996)). If a state provides for a direct appeal as of right from a criminal conviction, it must also provide "certain minimum safeguards necessary to make that appeal 'adequate and effective.'" *Evitts v. Lucey*, 469 U.S. 387, 392 (1985) (quoting *Griffin v. Illinois*, 351 U.S. 12, 20 (1956)); *see also Coe v. Thurman*, 922 F.2d 528, 530 (9th Cir. 1990) ("Where a state guarantees the right to a direct appeal, as California does, the state is required to make that appeal satisfy the Due Process Clause.").

In *Boyd v. Newland*, we applied these principles in granting the habeas petition of an indigent defendant who had been denied a copy of his voir dire transcript because the state court had, in violation of clearly established federal law, determined that the transcript was not necessary to his *Batson* appeal. 467 F.3d 1139 (9th Cir. 2006). We held that "all defendants ... have a right to have access to the tools

which would enable them to develop their plausible *Batson* claims through comparative juror analysis." *Id.* at 1150. It follows that if the state's loss of the questionnaires deprived Ayala of the ability to meaningfully appeal the denial of his *Batson* claim, he was deprived of due process.[10]

This conclusion is not called into question by *Briggs v. Grounds*, 682 F.3d 1165 (9th Cir. 2012), cited in the dissent. Dissent at 119. In *Briggs*, the petitioner had complete access to the juror questionnaires during the course of his state appeal. In fact, he relied heavily on them in presenting a comparative juror analysis to support his *Batson* claim. 682 F.3d at 1171. Thus Briggs's due process rights were not implicated. The language cited by the dissent is lifted from a section of the opinion discussing whether, because those questionnaires were not included in the federal court record, we should credit the petitioner's characterization of those questionnaires over the state court's characterization. *Briggs* is irrelevant for our purposes, i.e., whether Ayala's due process rights were implicated when California lost the juror questionnaires, thus rendering them unavailable for his *state court* appeal.

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[10] The dissent ignores the holding of *Boyd* and instead plucks the words "voir dire transcript" out of the opinion to argue that *only* a voir dire transcript is necessary for comparative juror analysis. Dissent at 117-19. If our dissenting colleague believes that jury questionnaires are not tools for comparative juror analysis, we point her to *Miller-El v. Dretke (Miller-El II)*, 545 U.S. 231, 256-57 (2005) and *Kesser v. Cambra*, 465 F.3d 351, 360 (9th Cir. 2006) (en banc), both of which utilized juror questionnaires in comparative juror analysis.

Ayala is entitled to relief on this claim only if the loss of the questionnaires was prejudicial *in se* or if it in conjunction with the *Batson* error discussed *supra* served to deprive him of a meaningful appeal. *Id.*; *see also Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993). "[I]n analyzing prejudice ..., this court has recognized the importance of considering the cumulative effect of multiple errors and not simply conducting a balkanized, issue-by-issue harmless error review." *Daniels v. Woodford*, 428 F.3d 1181, 1214 (9th Cir. 2005) (quoting *Thomas v. Hubbard*, 273 F.3d 1164, 1178 (9th Cir. 2001)). Here, the loss of the questionnaires increased the prejudice that Ayala suffered as a result of the exclusion of defense counsel from *Batson* steps two and three, as it further undermined his ability to show that *Batson* had been violated. Accordingly, in determining whether Ayala is entitled to relief, we evaluate the prejudice caused by the loss of the questionnaires in conjunction with the harm caused by excluding defense counsel from the *Batson* proceedings. As we will explain immediately below, the analysis under *Brecht* regarding the *Batson* error demonstrates that the exclusion of Ayala and his counsel from the second and third stages of the *Batson* inquiry is sufficiently prejudicial to require reversal for that reason alone.[11]

IV.

The California Supreme Court held that Ayala

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[11] Ayala also asserts that there is an Eighth Amendment right to appeal — and to a record adequate for appeal — in a capital case. *See Whitmore v. Arkansas*, 495 U.S. 149, 168 (1990) (Marshall, J., dissenting). We need not decide this question here.

was not prejudiced by the trial court's exclusion of the defense from stages two and three of the *Batson* proceedings, by the state's loss of the vast majority of the jury questionnaires, or by the two errors considered together. The Court declared itself "confident that the challenged jurors were excluded for proper, race-neutral reasons," *Ayala*, 6 P.3d at 204, concluded that the exclusion of defense counsel was "harmless beyond a reasonable doubt," *id.* (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)), and held that despite the loss of the questionnaires the record was "sufficiently complete for [it] to be able to conclude that [the struck jurors] were not challenged and excused on the basis of forbidden group bias." *Id.* at 208.

We now address these same questions., and hold that *Brecht v. Abrahamson*, 507 U.S. 619 (1993), requires us to reach a different conclusion.

A.

Ayala claims, first, that exclusion of defense counsel from the *Batson* proceedings necessarily represented structural error, and that he is entitled to relief without further inquiry into whether he was prejudiced. The state court's conclusion that the error here was not structural — a conclusion implicit in its application of the *Chapman* harmless error standard to evaluate whether Ayala had suffered prejudice — is subject to review under the deferential standard of § 2254(d). *See Byrd v. Lewis*, 566 F.3d 855, 862 (9th Cir. 2009).

The Supreme Court has defined as "structural" an error that affects "the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona v. Fulminante*, 499 U.S.

279, 310 (1991). Where this line is drawn is not always clear. *Compare, e.g., Waller v. Georgia*, 467 U.S. 39, 49 n.9 (1984) (violation of the right to public trial requires automatic reversal), *with, e.g., Rushen v. Spain*, 464 U.S. 114, 117-18 & n.2 (1983) (denial of a defendant's right to be present at trial is subject to harmless error review). While a violation of *Batson* is itself structural error, there is no Supreme Court decision addressing whether the exclusion of defense counsel from *Batson* proceedings constitutes structural error.

Ayala contends that the state court's decision represents an unreasonable application of the Supreme Court's clearly established rule that "no showing of prejudice need be made 'where assistance of counsel has been denied entirely or during a critical stage of the proceedings.'" Brief of Appellant at 22 (quoting *Mickens v. Taylor*, 535 U.S. 162, 166 (2002)); *see also United States v. Cronic*, 466 U.S. 648, 659 n.25 (1984).[12] The use of the phrase "critical stage" in this excerpt can be somewhat deceptive: although the *Batson* proceedings represented a "critical stage" in the sense that Ayala had the right to counsel during those proceedings, they were not necessarily the sort of "critical stage" at which the deprivation of that right constituted structural error. *See United States v. Owen*, 407 F.3d 222, 227 (4th Cir. 2005). As the Fourth Circuit has explained, the statements in *Mickens* and *Cronic*

> rely on the Supreme Court's earlier usage of the phrase "critical stage," in cases such

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[12] As the state observes, although *Mickens* postdates the California Supreme Court's decision, the opinion simply restates the rule set forth 18 years earlier in *Cronic*.

> as *Hamilton v.* [*Alabama*, 368 U.S. 52 (1961)] and *White* [*v. Maryland*, 373 U.S. 59 (1963) (per curiam)] to refer narrowly to those proceedings both at which the Sixth Amendment right to counsel attaches and at which denial of counsel necessarily undermines the reliability of the entire criminal proceeding.... [T]he Supreme Court has subsequently used the phrase "critical stage," in cases such as [*United States v.*] *Wade* [, 388 U.S. 218 (1967)] and *Coleman* [*v. Alabama*, 399 U.S. 1 (1970)], in a broader sense, to refer to all proceedings at which the Sixth Amendment right to counsel attaches — including those at which the denial of such is admittedly subject to harmless-error analysis.

Id. at 228 (emphasis omitted).

In *Musladin v. Lamarque*, we held that the "clearly established" rule of *Cronic* is that a "critical stage" where the deprivation of counsel constitutes structural error is one that holds "significant consequences for the accused." 555 F.3d 830, 839 (9th Cir. 2009) (quoting *Bell v. Cone*, 535 U.S. 685, 695-96 (2002)). We identified as providing guidance in this inquiry Supreme Court decisions holding an overnight trial recess and closing arguments to be two such critical stages. *Id.* at 839-40 (citing *Geders v. United States*, 425 U.S. 80 (1976) and *Herring v. New York*, 422 U.S. 853 (1975)).

Given this fairly ambiguous standard, it was not an unreasonable application of clearly established federal law for the California Supreme Court to conclude that the exclusion of the defense from

Batson steps two and three does not amount to a deprivation of the right to counsel such that the likelihood that the jury was chosen by unconstitutional means is "so high that a case-by-case inquiry is unnecessary." *Mickens*, 535 U.S. at 166. As the state points out, it would be somewhat incongruous to conclude that the exclusion of counsel during *Batson* proceedings is a defect in the very structure of the trial if the same exclusion would be permissible were there some reason to keep the prosecution's justifications confidential. Thus, a "fairminded jurist[]," *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)), might conclude that *Batson* steps two and three are not a *Cronic*-type "critical stage." Even if we would hold the error to be structural were we to consider the issue de novo, we cannot say that as the Supreme Court has construed AEDPA the state court's contrary conclusion was unreasonable. *See Musladin*, 555 F.3d at 842-43.

B.

Ayala claims next that, even if the trial court's exclusion of the defense was not the sort of constitutional error *in se* that requires that we presume that in every exclusion case prejudice ensues, it was prejudicial in *his* case, both in solo and when considered in conjunction with the loss of the questionnaires. In evaluating whether a trial error prejudiced a state habeas petitioner, we must apply the standard set forth in *Brecht v. Abrahamson*, determining whether the error had a "substantial and injurious effect or influence in determining the jury's verdict." 507 U.S. 619, 623 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). We "apply the *Brecht* test without regard for the

state court's harmlessness determination." *Pulido v. Chrones*, 629 F.3d 1007, 1012 (9th Cir. 2010) (citing *Fry v. Pliler*, 551 U.S. 112, 121-22 (2007)).[13]

The *Brecht* standard has been described as follows:

> [I]f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence.

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[13] If this appeal had come before us prior to the Supreme Court's decision in *Fry*, we would have instead asked whether the state court's determination that any error was harmless under *Chapman* was contrary to, or an unreasonable application, of federal law. *See Inthavong v. Lamarque*, 420 F.3d 1055, 1059 (9th Cir. 2005). *Fry* clarified, however, that *Brecht* is the harmless error standard to be applied in such circumstances because the *Brecht* standard "subsumes" the "more liberal" § 2254(d)/*Chapman* standard. *See Fry*, 551 U.S. at 120; *Merolillo v. Yates*, 663 F.3d 444, 454 (9th Cir. 2011). In other words, if a federal habeas court determines that the *Brecht* standard has been met, it also necessarily determines to be an unreasonable application of *Chapman* a state court's conclusion that the error was harmless beyond a reasonable doubt. In holding that Ayala has demonstrated his entitlement to relief under *Brecht*, we therefore also hold to be an unreasonable application of *Chapman* the California Supreme Court's conclusion that Ayala was not prejudiced by the exclusion of the defense during *Batson* steps two and three or by the loss of the questionnaires. *See Merolillo*, 663 F.3d at 458-59.

Merolillo v. Yates, 663 F.3d 444, 454 (9th Cir. 2011) (quoting *Kotteakos*, 328 U.S. at 765). "Where the record is so evenly balanced that a judge 'feels himself in virtual equipoise as to the harmlessness of the error' and has 'grave doubt about whether an error affected a jury [substantially and injuriously], the judge must treat the error as if it did so.'" *Id.* (quoting *O'Neal v. McAninch*, 513 U.S. 432, 435, 437-38 (1995)) (alteration in original) (internal quotations omitted).[14]

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[14] The dissent contends that *Brecht* no longer provides the proper standard of review for assessing prejudice, arguing instead that a writ may issue only if we determine that "no fairminded jurist could find that the exclusion of defense counsel and the loss of questionnaires did not prevent Ayala from prevailing on his *Batson* claim." Dissent at 115-16. The dissent's only authority for its conclusion is *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011), which the dissent suggests refined the *Brecht* test. Dissent at 115-16.

The dissent clearly errs in applying *Richter* to prejudice analysis under AEDPA. In *Fry*, 551 U.S. 112, the Supreme Court held that *Brecht* is the proper test for prejudice analysis under AEDPA. In *Richter*, handed down just four years later, the Supreme Court did not once mention *Fry* or *Brecht*. Furthermore, the Court's reference to "fairminded jurist" was *not* in the context of reviewing a state court's prejudice determination but rather in the context of whether a state court's determination regarding constitutional error was unreasonable. 131 S. Ct. at 785. (Here, as explained *supra*, the state court was silent on the question of error, and thus only prejudice is at issue.) The dissent thus seems willing to conclude that the Supreme Court radically changed *Brecht*, a nearly two-decade old precedent — a case with central import in virtually all federal habeas adjudication, reaffirmed just five years ago in *Fry* — without even a mention of that oft-cited case. There is no legal basis for the dissent's conclusion that a case cited almost 10,000 times to determine prejudice in habeas cases was sub silentio drastically overhauled in a discussion unrelated to prejudice. The dissent's reference to *Pinholster* is equally

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We conclude that Ayala has met the *Brecht* standard. The prejudice he suffered was the deprivation of the opportunity to develop, present, and likely prevail on his *Batson* claim. Had he prevailed on that claim, and shown that the prosecution acted upon impermissible considerations of race in striking even one of the seven black or

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unpersuasive. In that case, as in *Richter*, the Court did not use the language "fairminded jurist" in reviewing a state court's prejudice determination. *Cullen v. Pinholster*, 131 S. Ct. 1388, 1408 (2011).

Furthermore, because *Richter* and *Pinholster* were ineffective assistance of counsel cases, the Court had no reason to apply *Brecht*. *Strickland*, not *Brecht*, provides the proper prejudice standard for ineffective assistance of counsel claims. *See Musladin v. Lamarque*, 555 F.3d 830, 834 (9th Cir. 2009) ("[W]here a habeas petition governed by AEDPA alleges ineffective assistance of counsel under [*Strickland*], we apply *Strickland's* prejudice standard and do not engage in a separate analysis applying the *Brecht* standard.").

Additionally, in the thirty months since *Richter* was handed down, we have repeatedly applied the traditional *Brecht* test to assess prejudice in habeas cases. *E.g.*, *Merolillo*, 663 F.3d at 454; *Ybarra v. McDaniel*, 656 F.3d 984, 995 (9th Cir. 2011); *United States v. Rodrigues*, 678 F.3d 693, 695 (9th Cir. 2012). In some cases, we have cited *Richter* in analyzing constitutional error but then, properly, applied the traditional *Brecht* test when determining prejudice. *E.g.*, *Ocampo v. Vail*, 649 F.3d 1098, 1106 (9th Cir. 2011); *Schneider v. McDaniel*, 674 F.3d 1144, 1149-50 (9th Cir. 2012). Thus, even if we believed that the dissent were correct that *Richter* rewrote the test for prejudice (a conclusion that is wholly without support and that we unequivocally reject), this three-judge court, like all others, is nevertheless required to apply *Brecht* as it was (and is), because such is the law of the circuit. Lacking support in both Supreme Court and Ninth Circuit case law, the dissent's pronouncement simply amounts to a preference that the prejudice standard under AEDPA should be far more onerous than current law provides.

Hispanic jurors it struck, then, as the state acknowledged in oral argument before this court, we would be compelled to reverse Ayala's conviction because his entire trial would have been infected by this violation of the Constitution. *See Vasquez v. Hillery*, 474 U.S. 254, 263-64 (1986); *Boyd*, 467 F.3d at 1150. The question, then, is whether Ayala could have made this showing but for the state's constitutional errors. If we cannot say that the exclusion of defense counsel with or without the loss of the questionnaires likely did not prevent Ayala from prevailing on his *Batson* claim, then we must grant the writ.

Here, it is probable that the state's errors precluded Ayala from turning what is a very plausible *Batson* claim — the challenge to the prosecution's strikes of all minority jurors — into a winning one by preventing defense counsel from performing the two "crucial functions" we identified in *Thompson*. First, Ayala's counsel could have pointed out where the prosecution's purported justifications might be pretextual or indicate bad faith. Although the trial judge may have been able to "detect some of these deficiencies by himself,. . . there might be arguments [he] would overlook" because he was "unassisted by an advocate." *Thompson*, 827 F.2d at 1260-61. The jury selection process took over three months and comprises more than six thousand pages of the record. The trial judge, attempting to evaluate the prosecution's reasons for striking the jurors in light of this massive amount of information, was almost certain to forget or overlook key facts, but could have been substantially aided by the presence of participants in the process adverse to the prosecution. In particular, Ayala's lawyers could have pointed out when the prosecutor's proffered reason

for striking a black or Hispanic juror applied "just as well to an otherwise-similar nonblack [or non-Hispanic] who [was] permitted to serve." *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005). The Supreme Court has emphasized the importance of this sort of "comparative juror analysis" to determining whether a prosecutor's reasons for challenging a minority juror were pretextual. *Id.*; *see also Snyder v. Louisiana*, 552 U.S. 472, 483-85 (2008). Although Ayala can — and does — still raise some of these arguments on appeal, he was deprived of the crucial opportunity to present them to the institutional actor best positioned to evaluate them. As the Supreme Court has observed, appellate courts must accord deference to "trial court findings on the issue of discriminatory intent" because "the finding largely will turn on evaluation of credibility." *Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003) (quoting *Hernandez v. New York*, 500 U.S. 352, 366 (1991) (plurality opinion)) (internal quotation marks and citations omitted). Because, after finding a prima facie case of a *Batson* violation, the trial court was not made aware of key facts that could have influenced its credibility determination, there is substantial reason to doubt that Ayala's *Batson* challenge was properly denied.

Second, Ayala's counsel could have "preserve[d] for the record, and possible appeal, crucial facts bearing on the judge's decision." *Thompson*, 827 F.2d at 1261. We cannot know many of the facts material to whether the prosecution's stated reasons were false, discriminatory, or pretextual because defense counsel was not able to preserve relevant facts regarding prospective jurors' physical appearances, behavior, or other characteristics. Although the trial judge could have been aware of these facts, an

appellate court "can only serve [its] function when the record is clear as to the relevant facts, or when defense counsel fails to point out any such facts after learning of the prosecutor's reasons." *Id.*; *see also United States v. Alcantar*, 897 F.2d 436, 438 (9th Cir. 1990) (reversing a defendant's conviction where the *Batson* proceedings conducted below left the defense unable "to adequately challenge the prosecution's reasons as pretextual" and left the reviewing court uncertain as to whether the prosecution had, in fact, violated *Batson*).

This second deficiency is greatly augmented by the loss of the jury questionnaires. The only questionnaires that have been preserved are those of the seated and alternate jurors.[15] We are unable to evaluate the legitimacy of some of the prosecution's proffered reasons for striking the black and Hispanic jurors because they referred to questionnaires that are now lost. The loss of the questionnaires also leaves us lacking potentially crucial information about certain individuals who were neither the subject of Ayala's *Batson* challenge nor ultimately served as jurors.[16] Thus, we cannot perform a fair

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[15] There are also three other questionnaires out of more than 200 which were somehow located, but have no particular significance with respect to a comparative juror analysis.

[16] The state and the dissent both appear to presume that the only relevant comparisons in a comparative juror analysis are between the struck jurors and the jurors who are ultimately seated, but *Miller-El* made clear that the otherwise-similar jurors to whom the struck jurors can be compared include those "permitted to serve" by the prosecution but ultimately struck by the defense. *See, e.g.*, *Miller-El v. Dretke*, 545 U.S. at 244-45 (comparing a struck juror to a juror not challenged by the prosecution who was later challenged by the defense). This, of course, makes perfect sense: some of these jurors were not

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comparative juror analysis as required by *Batson*. *See Miller-El v. Dretke*, 545 U.S. at 241.

Even so, we have substantial reason to question the motivation of the prosecution in engaging in its peremptory challenges of the black and Hispanic jurors. In conducting our inquiry, we must keep in mind the strength of Ayala's prima facie case. "[T]he statistical evidence alone raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors." *Miller-El v. Cockrell*, 537 U.S. at 342. That the prosecution struck each of the seven black or Hispanic jurors available for challenge establishes a basis for significant doubt of its motives: "[h]appenstance is unlikely to produce this disparity." *Id.*

Perhaps more important, the analysis of the prosecution's motives that is possible on the partial record before us demonstrates that many of its stated reasons for striking the seven black and Hispanic jurors were or may have been false, discriminatory, or pretextual. There are good reasons to think that race motivated the prosecution's strikes of at least three, if not more, jurors: Olanders D., Gerardo O. and Robert M.[17] We "cannot say, with fair assurance,

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struck by the defense until after the prosecution had passed them for several rounds, and the "underlying question is not what the defense thought about these jurors," but what the prosecution did. *Id.* at 245 n.4.

[17] Although the record provides somewhat less reason to conclude that the prosecution's justifications for the strikes of the four other black and Hispanic jurors were pretextual, race may also have played a substantial role in these challenges. For example, Ayala might have been able to show that the prosecution violated *Batson* when it struck Hispanic juror George S. in the final round of peremptory challenges. The

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after pondering all that happened without stripping the erroneous action from the whole," *Kotteakos*, 328 U.S. at 765, that Ayala was not prevented from showing that the prosecution struck at least one of these jurors because of his race.

1. Olanders D.

Olanders D. was one of two black jurors whom the prosecution struck in the first round of peremptory challenges. During the in camera hearing that followed the defense's *Batson* motion, the prosecutor explained that he struck Olanders D. because: (1) he might not be able to vote for the death penalty, as he had written in his questionnaire that he did not believe in it, and he had indicated in questioning that his view had recently changed; (2) his answers to voir

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prosecution gave five reasons for striking George S. The first reason — that his application to be a police officer some twenty years earlier had been rejected — applied equally to seated white juror Charles C. The second reason — that he had indicated some discomfort with the death penalty — did not significantly distinguish him from a number of seated white jurors. *See infra* Section V.B.2. The third reason — that he had been a "holdout" on a prior jury — could have been called into question had defense counsel been able to point out that the jury on which George S. had been a "holdout" was a civil one, that the issue in dispute had been the assessment of damages, and that unanimity was not required. The fourth reason — that he had written in his questionnaire that the parties probably would not want him to serve as a juror — overlapped entirely with the third reason, as George S. had explained that he wrote that the parties might not want him as a juror because he had been a civil jury "holdout." The fifth and final reason — that he placed excessive emphasis on the Bible in his questionnaire — cannot be evaluated at all because the questionnaire has been lost, along with those of others whom the prosecutor might have passed.

dire questions often were not fully responsive; (3) his questionnaire responses had been "poor"; and (4) he might lack the "ability to fit in with a cohesive group of 12 people." The trial judge rejected one of the four proffered reasons — his purported inability "to fit in with a cohesive group of 12 people." The presence of defense counsel, and the preservation of the questionnaires, could have permitted Ayala to call into question all three of the reasons that the court accepted as legitimate.

First, in response to the prosecution's claim that it was concerned that Olanders D. would hesitate to impose the death penalty, defense counsel could have pointed to seated white jurors who had expressed similar or greater hesitancy. One seated juror in particular was indistinguishable from Olanders D. in this regard. Olanders D. had (apparently) written in his questionnaire that he did not believe in the death penalty. Ana L., a seated white juror, made almost precisely the same statement in her questionnaire, writing that she "probably would not be able to vote for the death penalty." Also, Olanders D. later said during voir dire that he had reconsidered his views, and affirmed that he could be "personally responsible for being on a jury and actually voting for the death penalty." Once again, Ana L. said almost precisely the same thing: she stated that she had since rethought her position, and affirmed that she could "actually vote" for the death penalty.[18]

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[18] Other seated white jurors to whom defense counsel could have pointed in order to show to be pretextual the prosecution's stated concern that Olanders D. would not be willing to impose the death penalty include Dorothy C., Dorothea L., Dorothy H. and Leona B. *See infra* Section V.B.2.

Second, in answer to the prosecution's purported concern that Olanders D.'s answers on voir dire were not always fully responsive, defense counsel could have questioned the validity of this assessment, suggested that his answers were in fact fully responsive, and pointed to seated white jurors whose answers were less responsive than Olanders D.'s. Our review of the voir dire transcript reveals nothing that supports the prosecution's claim: Olanders D.'s answers were responsive and complete. In order to make this fact clear to the trial judge, defense counsel could once again have compared Olanders D. to seated juror Ana L. Ana L. had, for example, responded "That is correct" to a question asking "why" she would prefer not to sit as a juror, stared blankly at defense counsel in response to a question on the presumption of innocence, and failed, at various points, to respond directly to yes or no questions.

Third, we cannot know exactly what arguments defense counsel could have made to undermine the prosecution's final reason for striking Olanders D. — that his questionnaire responses were "poor," and demonstrated his inability to express himself. Because Olanders D.'s questionnaire has been lost, we may only speculate as to its contents. If the reason his answers were "poor" was that they were not particularly detailed, the defense could have compared his questionnaire to that of Ana L., whose answers were brief and often incomplete, or to that of Charles G., a seated white juror whose responses to the 77 questions were rarely longer than two or three words apiece. If the reason his answers were poor was that they reflected an inability to think clearly or express complex thoughts, the defense could have compared his questionnaire to that of Thomas B., a

seated white juror who, for example, opined of street gangs, "I feel the only media coverage they get is bad, however, those whom do constructive events usually seek out positive media coverage." Further, this is an obvious instance in which the defense is prejudiced by being unable to compare Olanders D.'s answers to those of prospective white jurors who were accepted by the prosecution but struck by the defense, and whose questionnaires have been lost.[19] It is also, of course, possible that Olanders D.'s answers were not poor at all. We have no way of knowing.

Thus, one of the four reasons given by the prosecution for striking this prospective juror was determined to be without merit by the trial judge; two failed to distinguish the juror whatsoever from at

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[19] For example, Elizabeth S., who was in all likelihood white, was seated as an alternate on a panel accepted by the prosecution — which never used its sixth and final peremptory challenge in the selection of the alternate jurors — but was later struck by the defense. Her questionnaire, which was lost, might have been particularly valuable to Ayala for comparative juror analysis if her written responses were anything like those she delivered during voir dire. Consider the following exchange between the trial court and Elizabeth S.:

Q: Did you have an opportunity to review the summary of legal issues and preliminary questions? This was a packet of material in the juror's lounge.

A: No.

Q: You didn't read it?

A. Not today. I read the papers that they gave me in the office.

Q. Today?

A. Yeah.

Q. Okay. That was the summary of legal issues and preliminary questions?

A. Yeah, Yeah.

Perhaps because of this and similar exchanges, she was later asked if she had a hearing problem, which she did not.

least one seated white juror; and the fourth and final reason the prosecution gave for striking the juror cannot be evaluated because his questionnaire was lost, as were those of the prospective white jurors struck by the defense. Given the objective reasons that we have even on this record to question the validity of the prosecution's explanations for striking Olanders D., we simply cannot conclude that it is likely that, if the defense had been present during the *Batson* proceedings and if the lost questionnaires had been preserved, Ayala would not have been able to show that the prosecution's stated reasons for striking Olanders D. were pretextual, and that the actual reasons were racial.

2. Gerardo O.

Gerardo O. was one of two Hispanic jurors the prosecution challenged during the second round of peremptories. He was struck, the prosecutor explained in the subsequent ex parte proceeding, because: (1) he was "illiterate," and had needed the questionnaire to be translated for him; (2) he "appeared not to fit in with anyone else," was "standoffish," with "dress and mannerisms ... not in keeping with the other jurors," and "did not appear to be socializing or mixing with any of the other jurors"; and (3) his voir dire responses suggested that he was not sure "if he could take someone's life," and that he "felt a little shaky as far as his responsibilities in this case." The trial judge concluded that the "record document[ed] the factors that were indicated" by the prosecutor and accepted his explanation.

Once again, had the defense not been excluded from the *Batson* proceedings, it likely could have called into question all of the prosecution's stated reasons for striking Gerardo O. Defense counsel

could have first argued that one reason given — that Gerardo O. was illiterate — was itself indicative of the prosecution's discriminatory intent. Although Gerardo O. did need someone to fill out the questionnaire for him, the record reveals that he was not, in fact, illiterate, but simply had difficulty writing in English. Gerardo O. had been born in Mexico and was not a native English speaker, but he had graduated from high school and attended college in the United States, and was perfectly capable of reading the summary of legal issues that was given to prospective jurors before voir dire questioning. As he explained at voir dire, he did not fill out the questionnaire himself because he was concerned about his English spelling. The prosecution's purported reason for striking Gerardo O., then, was directly related to his status as someone who spoke Spanish as his first language. Thus, as the Supreme Court observed in a similar circumstance, "the prosecutor's frank admission that his ground for excusing th[is] juror[] related to [his] ability to speak and understand Spanish raised a plausible, though not a necessary, inference that language might be a pretext for what in fact [was a] race-based peremptory challenge[]." *Hernandez*, 500 U.S. at 363 (plurality opinion). Defense counsel's presence was necessary to point out the potential inferences to the trial judge and urge the judge to adopt the one most appropriate here.

An inference of racial bias might also have been drawn from the prosecutor's claim that Gerardo O. was challenged because he did not dress or act like other jurors, and did not mix or socialize with them. It is likely that Gerardo O.'s dress and mannerisms were distinctly Hispanic. Perhaps in the late 1980s Hispanic males in San Diego County were more

likely than members of other racial or ethnic groups in the area to wear a particular style or color of shirt, and Gerardo O. was wearing such a shirt (and for this reason did not "fit in," in the prosecutor's mind, with the other jurors). If so, and if defense counsel were able to bring this fact to the trial court's attention, the prosecution's explanation that it struck Gerardo O. because of his dress and mannerisms would provide compelling support for Ayala's claim that the strike was actually racially-motivated. *See id.* ("[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the [classification] bears more heavily on one race than another.") (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)). If present at the hearing, defense counsel could have made a record that would have strongly supported these claims.

Even if Gerardo O.'s clothes and behavior were in no way correlated with his race, defense counsel might have been able to show the prosecution's explanation to be pretextual. Defense counsel might have pointed to other jurors the prosecution had not struck who had similar characteristics — perhaps, for example, a seated white juror had actually worn an outfit identical to Gerardo O.'s. Defense counsel might also have been able to challenge the factual basis for the prosecution's claim — perhaps, unbeknownst to the trial judge, Gerardo O. did "socializ[e] or mix[]" with a number of other jurors, and had even organized a dinner for some of them at his favorite Mexican restaurant.

We can only speculate as to whether or how Ayala could have shown this explanation for striking Gerardo O. to be facially discriminatory, false or

pretextual because we know nothing about his dress or mannerisms, or that of the other prospective jurors. These are exactly the sort of physical and behavioral observations that the defense could have preserved for the record had it been permitted to hear and respond to the prosecution's explanations for challenging Gerardo O. Although we might hope that the trial judge would have noticed if Gerard O. had been wearing a shirt worn only by members of the Hispanic community, or had been dressed identically to other prospective jurors whom the prosecution had not challenged, or had in fact been socializing with other jurors, "we cannot affirm simply because we are confident he must have known what he was doing." *Thompson*, 827 F.2d at 1261.

Finally, in response to the prosecution's third reason for the strike — that Gerardo O. seemed reluctant to impose the death penalty — defense counsel could have demonstrated this reason to be pretextual through comparisons to jurors the prosecution did not strike. Gerardo O. had stated during voir dire that "I'm not sure if I can take someone's life in my hand and say ... you know, 'death,' or something," but he soon thereafter affirmed that he "could vote for the death penalty." This statement was indistinguishable from those made by a number of seated white jurors. Dorothy C. said in voir dire that serving as a juror in a capital case would cause her to "worry a lot" because it was "a lot of responsibility," gasped when defense counsel told her that as a juror she would "decide the sentence," and stated, "I've never had to vote on a death penalty. That might be a little bit difficult when it came right down to it, but I'd say I'm for it." Likewise, Dorothy H., when asked in voir dire if she could return a verdict of death, stated, "I don't think

it would be an easy thing for anyone, but I don't — I think I could do it if I felt it was the thing to do." Dorothea L. was even more hesitant, saying, when asked the same question, "I think so, but I don't know until I have to do it." Finally, Leona B., when asked by the prosecutor if having the responsibility for imposing the death penalty would "bother" her, responded, "Yes, I think so. I think — I think one should be affected ... by that. I don't think it's anything to be taken lightly." Certainly, Gerardo O. expressed less hesitancy than Ana L., who had flatly stated on her questionnaire that she "probably would not be able to vote for the death penalty" before subsequently changing her mind. Further, prospective white jurors accepted by the prosecution but struck by the defense might have expressed similar sentiments in their jury questionnaires. We cannot tell, because these questionnaires have been lost.

Thus, one of the reasons given by the prosecution for striking this prospective juror could have itself given rise to an inference of discriminatory intent. A second reason cannot be evaluated because defense counsel was excluded from the *Batson* proceedings and could not preserve for the record certain crucial facts. The third reason given failed to distinguish Gerardo O. from seated white jurors the prosecutor chose not to strike, as well as, possibly, from other prospective white jurors struck not by the prosecution but by the defense. Given the cause we have to question the validity of the prosecution's reasons that can be evaluated on this record, we cannot say that Ayala would not have shown that the trial court would or should have determined that the prosecution's strike of Gerardo O. violated *Batson*.

3. Robert M.

The prosecution struck Hispanic juror Robert M. in the final round of peremptory challenges. In camera, the prosecutor explained that he had been concerned, given Robert M.'s response to voir dire questioning, that he might not be willing to impose the death penalty. This concern had been heightened by Robert M.'s mentioning the Sagon Penn case — a case in which the defendant was found not guilty in a second trial and the police and the district attorney's office were accused of misconduct. The trial judge accepted the prosecution's explanation, stating that, although Martinez's "questionnaire would tend to indicate a person that is certainly pro the death penalty[,] ... his answers varied somewhat to the extent that individually, there may well be a legitimate concern as to whether or not he could impose it."

Defense counsel's presence in the *Batson* proceedings was necessary to call into question the prosecution's claim that it struck Robert M. because of his reluctance to impose the death penalty. Even without comparing Robert M. to other jurors permitted to serve, this explanation is highly suspect: Robert M. repeatedly stated during voir dire that he believed in the death penalty and could personally vote to impose it, and his questionnaire (which has, of course, been lost) manifested a similar enthusiasm according to the trial judge. Defense counsel could have brought to the trial court's attention that the only statement potentially raising any question whatsoever — that voting for a death sentence might "weigh on his conscience," and would be a "heavy" decision — was indistinguishable from a practical standpoint from statements by Dorothy C., who said

that serving as juror in a capital case was "a lot of responsibility" and would cause her to "worry a lot," Dorothy H., who stated that imposing the death penalty would not "be an easy thing for anyone," Dorothea L., who said she would not know if she could impose the death penalty until she had to do it, and Leona B., who affirmed that this responsibility would "bother" her. Other prospective jurors who were struck by the defense, but had been accepted by the prosecution, may have made comparable statements in their questionnaires (which, again, have been lost). Counsel could have argued that most jurors who believed in imposing the death penalty would consider a decision to do so a "heavy" decision that would weigh on one's conscience. Following counsel's argument, the judge might well have recognized that there is indeed rarely a "heavier" decision a citizen is ever asked to undertake. Certainly, like Gerardo O., Robert M. was no more hesitant than Ana L., who had actually at one point stated that she would be unable to impose the death penalty.

To the extent that the prosecution gave Robert M.'s reference to the Sagon Penn case as a separate reason for its challenge, defense counsel could likely have demonstrated that this reason was pretextual. First, the entirety of the Sagon Penn exchange was as follows:

> **Prosecutor**: Have you followed any kind of — any court cases in the news or come downtown to watch any trials?
>
> **Robert M.**: Well, I followed the Saigon [sic] Penn case.
>
> **Prosecutor**: All right.

Robert M. briefly mentioned the case in response to the prosecution's question, and he said nothing about any accusations of police or prosecutorial misconduct.

Second, although none of the seated jurors had been asked a similar question, one seated white juror had on his own initiative referred to a far more controversial capital case. When asked to describe his feelings about the death penalty, Douglas S. mentioned the "Harris" case, saying: "The Harris case, which goes back .... I believe he's on death row ... I can't even recall the exact crimes, but I remember them to be quite bizarre, and — and here he was, facing execution, and I don't know." Douglas S. was presumably referring to Robert Alton Harris, who at the time of Ayala's trial was on California's death row, and had, in a case that was extensively covered by the press, been tried, convicted and sentenced to death in San Diego. *People v. Harris*, 623 P.2d 240, 246 (Cal. 1981). As Harris's case wound its way through the state and federal courts, it generated substantial controversy, some of which, as in the Sagon Penn case, was related to allegations of official misconduct. *See, e.g., id.* at 267 (Bird, C.J., dissenting) (arguing that Harris had been denied his right to a fair trial due to extensive and prejudicial pretrial publicity, partially the product of the "sorry spectacle of prosecutorial offices publicly vying with each other to have 'first crack' at convicting the accused"); *see also* Stephen R. Reinhardt, The Supreme Court, The Death Penalty, and The *Harris* Case, 102 Yale L.J. 205, 205 & n.1 (1992) (for further description of controversy generated by case). Douglas S.'s statement about the case — "here he was, facing execution, and I don't know" — suggests that this controversy had created some doubt in his mind as to the propriety of Harris's conviction and

sentence. Certainly, Douglas S.'s unelicited discussion of the Harris case should have troubled the prosecutor far more than Robert M.'s brief direct response regarding the Sagon Penn case.

Finally, if there was any inference to draw from Robert M.'s fleeting reference to the Sagon Penn case, it was that Robert M. would not return a guilty verdict based on a blind trust of the police and the prosecution who had arrested and charged the defendant with the crime. Numerous seated white jurors expressed similar sentiments. Douglas S., for example, stated that the last person who had lied to his face was a California policeman. Similarly, Charles C. said, "You don't change your stripes ... when you put on a badge; and you have to judge everybody's testimony in a court case on its face."

Even if the trial judge had not been willing to completely reject the prosecution's implausible explanation that it struck Robert M. because he mentioned the Sagon Penn case, there is a strong likelihood that, had defense counsel been present and been able to persuade the court that the prosecution's principal reason for challenging this juror — his reluctance to impose the death penalty — was pretextual, the court would have concluded that the strike violated *Batson*. We thus cannot conclude that the exclusion of defense counsel from the *Batson* proceedings did not prevent Ayala from showing that the prosecution's strike of Robert M. was based on its impermissible consideration of race.

* * *

Although each of the reasons offered by the prosecution for challenging the black and Hispanic jurors discussed above could have been shown to be

pretextual had defense counsel been allowed to participate at steps two and three of the *Batson* proceedings, it is not necessary that all of the reasons advanced by the prosecution be pretextual or be shown to be pretextual. Notwithstanding the existence of some apparently appropriate reasons, "if a review of the record undermines ... *many* of the proffered reasons, the reasons may be deemed a pretext for racial discrimination." *Kesser v. Cambra*, 465 F.3d 351, 360 (9th Cir. 2006) (en banc) (quoting *Lewis v. Lewis*, 321 F.3d 824, 830 (9th Cir. 2003)) (emphasis added). In short, "[a] court need not find all nonracial reasons pretextual in order to find racial discrimination" with respect to any particular juror, and the exclusion of any one juror in violation of *Batson* requires reversal of the verdict. *Id.*

C.

Because the defense was excluded from the *Batson* proceedings, it could not bring necessary facts and arguments to the attention of the trial judge, the institutional actor best positioned to evaluate the prosecution's credibility and to determine if its proffered reasons for striking the minority jurors were its actual and legitimate reasons. Furthermore, because the defense was excluded from the *Batson* proceedings, the appellate courts reviewing this case cannot engage in a proper comparative juror analysis, or know what other facts and arguments might be employed to demonstrate that the proffered reasons were false, facially discriminatory, and pretextual. The latter form of prejudice was exacerbated when the vast majority of the juror questionnaires were lost.

Even on this deficient record, Ayala's *Batson* claim is compelling: the prosecution struck all seven

of the black and Hispanic jurors in a position to serve on the jury, and many of its proffered race-neutral reasons are highly implausible. Given the strength of Ayala's prima facie case, the evidence that the prosecution's proffered reasons were false or discriminatory, and the inferences that can be drawn from the available comparative juror analysis, it is "impossible to conclude that [Ayala's] substantial rights were not affected" by the exclusion of defense counsel from the *Batson* proceedings. *Kotteakos*, 328 U.S. at 765. Ayala has suffered prejudice under *Brecht*, and is entitled to relief. When that demonstration of prejudice is supplemented by the state's loss of the juror questionnaires, the case for prejudice under *Brecht* is even more clear.

V.

Although our conclusions in Parts III and IV — that the state court committed federal constitutional error that prejudiced Ayala under the *Brecht* standard — would dictate that he be granted habeas relief, we may not grant such relief if, as the state asserts, and the district court agreed, Ayala's claim (specifically his exclusion from stages two and three of the *Batson* proceedings) is barred by *Teague v. Lane*, 489 U.S. 288 (1989). "[I]n addition to performing any analysis required by AEDPA, a federal court considering a habeas petition must conduct a threshold *Teague* analysis when the issue is properly raised by the state." *Horn v. Banks*, 536 U.S. 266, 272 (2002).

Under *Teague*, a "new constitutional rule[] of criminal procedure" cannot be applied retroactively to cases on collateral review. 489 U.S. at 310 (plurality opinion). Thus, "[b]efore a state prisoner may upset his state conviction or sentence on federal

collateral review, he must demonstrate as a threshold matter that the court-made rule of which he seeks the benefit is not 'new,'" but had been established at the time his conviction became final. *O'Dell v. Netherland*, 521 U.S. 151, 156 (1997). "A holding constitutes a 'new rule' within the meaning of *Teague* if it 'breaks new ground,' 'imposes a new obligation on the States or the Federal Government,' or was not '*dictated* by precedent existing at the time the defendant's conviction became final.'" *Graham v. Collins*, 506 U.S. 461, 467 (1993) (quoting *Teague*, 489 U.S. at 301).[20]

We hold that Ayala's claim does not require the retroactive application of a new constitutional rule of criminal procedure, and thus is not *Teague*-barred. At the time Ayala's conviction became final on May 14, 2001, it was established that defense counsel must be permitted to be present and offer argument during *Batson* steps two and three when, as in Ayala's case, the proceedings do not require the prosecution to reveal confidential information or trial strategy.

A.

In this Circuit, this rule was unequivocally "dictated by precedent," *Teague*, 489 U.S. at 301 (emphasis omitted), long before Ayala's conviction

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[20] *Teague* is subject to two exceptions. *See Saffle v. Parks*, 494 U.S. 484, 494-95 (1990) (a "new rule" can be applied retroactively on collateral review if "the rule places a class of private conduct beyond the power of the State to proscribe," or if it constitutes a "'watershed rule[] of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding") (quoting *Teague*, 489 U.S. at 311). Neither party contends that either exception is applicable in this case.

became final, having been established in *United States v. Thompson*, 827 F.2d 1254 (9th Cir. 1987). In *Thompson*, we held that a district court had made a constitutional error when, after the defendant had established a prima facie case under *Batson*, the court permitted the prosecution to state the reasons for its peremptory strikes ex parte. Observing that *Batson* step two might sometimes require the prosecutor to "reveal confidential matters of tactics and strategy," we recognized that in some circumstances there might be "compelling" reasons to conduct the proceedings ex parte. *Id.* at 1258-59. We therefore declined to adopt an absolute rule holding that the defense must *always* be permitted to participate at *Batson* steps two and three. We held, however, that defense counsel must be permitted to be present and offer argument during *Batson* steps two and three if the prosecution's proffered race-neutral reasons do not involve confidential or strategic information. *Id.* at 1258-59.[21]

Our decision in *Thompson* represented the straightforward application of two lines of Supreme Court precedent. The first line of precedent finds its source in the Sixth Amendment's guarantee of the right to counsel. Because "the plain wording of" the Amendment "encompasses counsel's assistance

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[21] The dissent suggests that, because *Thompson* recognized the need for "occasional departures" from the rule regarding the exclusion of defense counsel from *Batson* steps two and three, *Thompson*, 827 F.2d at 1258, its conclusion was "not [] a clear rule of constitutional law." Dissent at 94-95. We are puzzled by this, as many constitutional rules recognize exceptions — e.g., the exigency exception to the Fourth Amendment prohibition on warrantless searches, and the public safety exception to *Miranda* — but that does not make the rules any less clear.

whenever necessary to assure a meaningful 'defence,'" the Court has long held that the right applies at all "critical" stages of criminal proceedings. *United States v. Wade*, 388 U.S. 218, 224-25 (1967); *see also, e.g., White v. Maryland*, 373 U.S. 59, 60 (1963); *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963). Ultimately, the right to counsel "has been accorded ... 'not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial.'" *Mickens*, 535 U.S. at 166 (quoting *Cronic*, 466 U.S. at 658). Foremost among the attributes of a fair trial is the requirement that it be adversarial in nature: "[t]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Herring v. New York*, 422 U.S. 853, 862 (1975). "The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." *Cronic*, 466 U.S. at 656. As we observed in *Thompson*, "[t]he right of a criminal defendant to an adversary proceeding is fundamental to our system of justice," and thus ex parte proceedings are justifiable only as "uneasy compromises with some overriding necessity." 827 F.2d at 1258.

Batson is the seminal case in the second line of precedent. After setting out the three-stage framework used to determine whether the prosecution has engaged in purposeful racial discrimination in the selection of a jury, the *Batson* Court declined "to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges." 476 U.S. at 99. *Batson* made clear, however, that the defendant bears the ultimate

burden of persuasion. *Id.* at 98. *Batson* also made clear that a court must consider "all relevant circumstances" in deciding whether a defendant has met his burden of persuasion — an inquiry that requires determining whether a prosecutor's stated reasons for striking a particular juror are race-neutral, and, if race-neutral, whether they are his actual reasons. *Id.* at 96-99; *see Miller-El v. Dretke*, 545 U.S. 231, 240 (2005).

In *Thompson*, we recognized that the *Batson* framework leaves defense counsel with "two crucial functions" that it must be permitted to perform. 827 F.2d at 1260. The first function is "to point out to the district judge where the government's stated reason may indicate bad faith." *Id.* As we explained:

> For example, government counsel here excluded one of the jurors because he lived in defendant's neighborhood and wore jeans to court. This seems like a legitimate reason, unless a nonexcluded juror also wore jeans or other casual dress, or lived in the same neighborhood as the defendant.... [D]efense counsel might have been able to point out that the stated reasons were pretextual because others similarly situated were allowed to serve. In addition, defense counsel might have been able to argue that the reasons advanced by the prosecution were legally improper.... Of course, the district judge might be able to detect some of these deficiencies by himself, but that is not his normal role under our system of justice.

Id. The second function is to "preserve for the record, and possible appeal, crucial facts bearing on the

judge's decision." *Id.* at 1261. As we reasoned in *Thompson*:

> All we have before us concerning this issue is the prosecutor's explanation of her reasons and the district judge's ruling.... [I]f we are to review the district judge's decision, we cannot affirm simply because we are confident he must have known what he was doing. We can only serve our function when the record is clear as to the relevant facts, or when defense counsel fails to point out any such facts after learning of the prosecutor's reasons.... Here, the record's silence cannot be reassuring.

Id. Thus, we held, only with the presence and assistance of defense counsel can the trial judge and subsequent appellate judges properly evaluate whether the defense has met its burden of persuasion under *Batson*. Excluding the defense from the *Batson* proceedings without some compelling justification therefore violates the Constitution. *Id.* at 1259-61.[22]

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[22] The state and the dissent, in arguing that Ayala's claim is barred by *Teague*, cite *Lewis v. Lewis*, 321 F.3d 824 (9th Cir. 2003), a case in which we granted a habeas petitioner's *Batson* claim. In the course of some extended musings regarding the " ideal procedures under *Batson*," *id.* at 830, the *Lewis* panel observed, in a footnote, that the argument that "a court must allow defense counsel to argue" at *Batson* step three was not "clearly established law," as it "appears not to have been addressed by courts." *Id.* at 831 n.27. This passage is dicta, as the question of whether defense counsel must be permitted to argue at *Batson* step three was not "presented for review" in *Lewis*. *Barapind v. Enomoto*, 400 F.3d 744, 750-51 (9th Cir. 2005) (en banc) (per curiam). Indeed, this passage could not represent anything but dicta, as the *Lewis* panel could not

(continued...)

Thompson compels us to conclude that the rule Ayala seeks is not, under *Teague*, a "new" one. "[C]ircuit court holdings suffice to create a 'clearly established' rule of law under *Teague*.'" *Belmontes v. Woodford*, 350 F.3d 861, 884 (9th Cir. 2003) (reversed on other grounds by *Brown v. Belmontes*, 544 U.S. 945 (2005)); *see Williams v. Taylor*, 529 U.S. 362, 412 (2000) (O'Connor, J., for the Court) ("With one caveat, whatever would qualify as an old rule under our *Teague* jurisprudence will constitute 'clearly established Federal law, as determined by the Supreme Court of the United States' under § 2254(d)(1) .... The one caveat, as the statutory language makes clear, is that § 2254(d)(1) restricts the source of clearly established law to this Court's jurisprudence."). We have held that, as long as a rule derived from Supreme Court precedent was established in *this* Circuit when a petitioner's conviction became final, it is not a "new rule" under *Teague*. *See Belmontes*, 350 F.3d at 884; *Bell v. Hill*, 190 F.3d 1089, 1092-93 (9th Cir. 1999). "This is true even [if] other federal courts and state courts have rejected our holding." *Bell*, 190 F.3d at 1093. Because *Thompson* itself relied on the Supreme Court's right to counsel and equal protection jurisprudence, "we cannot now say that a state court would not have felt compelled by the Constitution and Supreme Court precedent" to conclude that the rule Ayala contends

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(...continued)
overrule our prior decision in *Thompson*, of which it was apparently unaware. *See Miller v. Gammie*, 335 F.3d 889, 899-900 (9th Cir. 2003) (en banc) (holding that a prior panel's decision may only be overruled by a subsequent panel if the decision is "clearly irreconcilable" with a higher court's intervening ruling). Thompson's holding thus unquestionably remains binding Circuit law.

must be applied was not established at the time his conviction became final. *Id.*

B.

We would hold that Ayala's claim is not *Teague*-barred even if we were free to conclude that, contrary to *Bell* and *Belmontes*, *Thompson* did not in and of itself establish that the rule Ayala seeks is not "new." Nearly every court to consider the question by the time Ayala's conviction became final had adopted the rule that we set forth in *Thompson*, concluding that defense counsel must be allowed to participate at *Batson* steps two and three except when confidential or strategic reasons justify the challenge. The Fourth, Eighth and Eleventh Circuits had all so held. *See United States v. Garrison*, 849 F.2d 103, 106 (4th Cir. 1988) ("We ... agree with the Ninth Circuit that the important rights guaranteed by *Batson* deserve the full protection of the adversarial process except where compelling reasons requiring secrecy are shown."); *United States v. Roan Eagle*, 867 F.2d 436, 441 (8th Cir. 1989) ("[O]nce the prosecutor has advanced his racially neutral explanation, the defendant should have the opportunity to rebut with his own interpretation."); *United States v. Gordon*, 817 F.2d 1538, 1541 (11th Cir. 1987) (remanding for an evidentiary hearing where the district court had denied the defendant's request for a hearing to rebut the government's proffered race-neutral reasons). The state courts that confronted the issue had all reached similar conclusions. *See Ayala*, 6 P.3d at 203; *Goode v. Shoukfeh*, 943 S.W.2d 441, 452 (Tex. 1997); *People v. Hameed*, 88 N.Y.2d 232, 238 (1996), 666 N.E.2d 1339, 644 N.Y.S.2d 466; *State v. Hood*, 245 Kan. 367, 378 (1989); *Gray v. State*, 317 Md. 250, 257-58 (1989); *Commonwealth v. Jackson*, 386 Pa.

Super. 29, 51 (1989); *Commonwealth v. Futch*, 38 Mass. App. Ct. 174, 178 (1995); *see also Caspari v. Bohlen*, 510 U.S. 383, 395 (1994) ("[I]n the *Teague* analysis the reasonable views of state courts are entitled to consideration along with those of federal courts.").

These courts adopted the *Thompson* rule with good reason. The Sixth Amendment provides that the defendant must be permitted to have the assistance of a trained advocate at all critical stages of the proceedings in order to test and challenge all aspects of the prosecution's case. *See Cronic*, 466 U.S. at 656. *Batson* did not suggest that there should be an *exception* to this overarching rule when a defendant has established a prima facie case that the prosecutor has struck jurors on the basis of race. To the contrary, it makes no sense to put the burden of persuasion on the defense, as *Batson* does, and then refuse defense counsel the opportunity to hear and respond to the prosecution's explanations. The rule Ayala seeks is not in any sense new, but rather one which, as almost all courts to have considered the question have concluded, follows directly from the more general rule that the defendant has the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." *Id.*; *see also Wright v. West*, 505 U.S. 277, 308-09 (1992) (Kennedy, J., concurring in the judgment) ("Where the beginning point is a rule of ... general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent.").

The state and the dissent call our attention to two decisions that reached a contrary conclusion, both of

which were decided soon after the Court issued *Batson*. In *United States v. Davis*, the Sixth Circuit rejected a defendant's argument that his right to be present had been violated when the trial court allowed the prosecution to explain its peremptory strikes in camera, holding that "the district court was entitled to hear from the Government under whatever circumstances the district court felt appropriate." 809 F.2d 1194, 1202 (6th Cir. 1987). Similarly, in *United States v. Tucker*, the Seventh Circuit held that the Sixth Circuit was correct to conclude that "*Batson* neither requires rebuttal of the government's reasons by the defense, nor does it forbid a district court to hold an adversarial hearing." 836 F.2d 334, 340 (7th Cir. 1988).[23]

These decisions do not render Ayala's claim *Teague*-barred. "[T]he standard for determining when a case establishes a new rule is 'objective,' and the mere existence of conflicting authority does not necessarily mean a rule is new." *Williams*, 529 U.S. at 410 (quoting *Wright*, 505 U.S. at 304 (1992)

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[23] The state and the dissent also cite a third decision that they contend demonstrates that there is a Circuit split that precludes our finding that the rule Ayala seeks was "dictated by precedent." In *Majid v. Portuondo*, where the issue was whether the defense had the right to cross-examine witnesses at a *Batson* hearing, the Second Circuit remarked gratuitously that "[i]t remains at least arguable that courts holding *Batson* hearings may ... hear the [prosecution's] explanations in camera and outside the presence of the defendants." 428 F.3d 112, 128 (2d. Cir. 2005). The question of whether a challenge to the type of in camera hearing conducted in Ayala's case is *Teague*-barred was not, however, before the court. Moreover, this passage in *Majid* can be understood as observing only that there is no *absolute* right to an adversarial proceeding, which is consistent with the rule that Ayala seeks here.

(O'Connor, J., concurring in the judgment)). To the extent that these decisions deny that there is any right to participate in *Batson* proceedings, they simply cannot be reconciled with the basic Sixth Amendment requirement that, at all critical stages of criminal proceedings, the defendant must have the assistance of counsel in order to subject the prosecution's case to adversarial testing. That the courts in *Davis* and *Tucker* failed to fully appreciate the relevance of this principle is understandable, as in neither case did the defendants invoke the right to counsel to support their claim: in *Davis*, the defendants asserted that the in camera hearings had violated *their* right to be present at trial, a right derived principally from the Sixth Amendment's Confrontation Clause, *see Davis*, 809 F.2d at 1200; in *Tucker*, the defendant claimed that the ex parte proceedings violated his rights to due process and to an impartial jury, *see Tucker*, 836 F.2d at 338, 340. Perhaps for this reason, the Davis court failed to recognize the important functions counsel serves during *Batson* steps two and three, instead concluding that once the defense had established a prima facie case of racial discrimination, its "participation was no longer necessary for the district court to make its determination." 809 F.2d at 1202. As we explained in *Thompson*, this statement is simply not true: defense counsel continues to serve the two crucial functions of bringing facts and arguments to the attention of the trial court and preserving them for the record. *Thompson*, 827 F.2d at 1260-61. Likewise, the court in *Tucker* rejected the rule we adopted in *Thompson* because it concluded that *Batson* itself did not require the defense to be present during *Batson* steps two and three, and because our exception permitting ex parte

proceedings in some circumstances threatened to "swallow the rule." *See Tucker*, 836 F.2d at 338, 340. Our rule is not, however, derived directly from *Batson*, but rather from the confluence of *Batson* and the Court's Sixth Amendment jurisprudence. Moreover, the fact that a rule is subject to an exception — perhaps even a relatively broad exception — is not a justification for rejecting the rule altogether when the result, in those cases in which the exception does not apply, is to deprive a defendant of his constitutional rights.[24]

Even assuming some doubt may have existed as to whether the rule Ayala seeks was "dictated by precedent" in the immediate aftermath of the Sixth and Seventh Circuits' decisions in 1987 and 1988, by the time Ayala's conviction became final in 2001, 13 years later, every court to have considered the issue in the interim — state and federal — had rejected, either explicitly or implicitly, the Sixth and Seventh Circuits' view, and had adopted the *Thompson* rule. *See Garrison*, 849 F.2d at 106; *Roan Eagle*, 867 F.2d at 441; *Ayala*, 6 P.3d at 203; *Goode*, 943 S.W.2d at 452; *Hameed*, 88 N.Y.2d at 238; *Hood*, 245 Kan. at 378; *Gray*, 317 Md. at 257-58; Jackson, 386 Pa. Super, at 51; *Futch*, 38 Mass. App. Ct. at 178. The Supreme Court had also, in the interim,

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[24] *Tucker* itself may be read to recognize this point, as it did not explicitly reject our conclusion that an adversarial hearing at *Batson* steps two and three was sometimes constitutionally compelled. *Id.* at 340. It observed that, in general, "adversarial hearings are the most appropriate method for handling most *Batson*-type challenges." *Id.* Thus, although the *Tucker* court purported to reject *Thompson* in favor of *Davis*, the decision did not necessarily foreclose defendants from claiming that their rights had been violated by the trial court's employment of a nonadverserial *Batson* proceeding.

acknowledged a version of our rule when it observed (in dicta) that, when a prosecutor challenges a defendant's use of peremptory challenges, "[i]n the rare case in which the explanation for a challenge would entail confidential communications or reveal trial strategy, an *in camera* discussion can be arranged." *Georgia v. McCollum*, 505 U.S. 42, 58 (1992). Thus, the California Supreme Court characterized the rule Ayala sought — the *Thompson* rule — as one that had been "almost universally recognized." *Ayala*, 6 P.3d at 203. Given that the California Supreme Court's description is correct, the rule that Ayala would have us apply is not *Teague*-barred.[25]

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[25] We also note that where, as here, the state court applied the rule in question on direct appeal, and determined it to be "almost universally recognized," the application of *Teague* to bar the petitioner's claims would do little to further the doctrine's purpose. *Teague* is motivated by considerations of comity and finality. *See Teague*, 489 U.S. at 308. Its purpose is to afford repose to the states by ensuring that criminal convictions that were valid at the time they became final will not be upset by subsequently discovered constitutional rules. As Justice O 'Connor explained, applying new rules on collateral review

> *continually* forces the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then existing constitutional standards. Furthermore, as we recognized in *Engle v. Isaac*, "[s]tate courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands." [456 U.S. 107, 128 n.33 (1982).]

Id. at 310. Although *Teague* may still bar the application in federal habeas proceedings of rules that the state courts have themselves recognized, *cf. Beard v. Banks*, 542 U.S. 406, 413

(continued...)

Accordingly, we conclude that, at the time Ayala's conviction became final, it was established for purposes of *Teague* that defense counsel cannot be excluded from *Batson* steps two and three absent some "compelling justification" for doing so. *Thompson*, 827 F.2d at 1259-60. The California Supreme Court held that this rule was violated in Ayala's case. It found, and the state does not dispute, that "no matters of trial strategy were revealed" in the hearings at which the prosecution explained its reasons for its peremptory challenges of all the potential black and Hispanic jurors. *Ayala*, 6 P.3d at 203.[26] Thus, the exclusion of defense counsel was in

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(...continued)
(2004), *Horn*, 536 U.S. at 272, the interests of comity and finality are obviously far less weighty when a state court has accepted a rule than when it has rejected or ignored a rule. Here, the state is not being forced to marshal resources to defend against a new and novel claim that was not recognized at the time the conviction became final; nor did it faithfully apply existing constitutional law only to have a federal court subsequently apply new constitutional commands. To the contrary, the state is challenging a rule that the California Supreme Court found to be well established and controlling at the time it affirmed Ayala's conviction on direct appeal, as well as at the time the trial court conducted its proceedings. Certainly the state court could not be "frustrated" to find that a federal court determined that it was error to exclude the defense from the *Batson* proceedings when the state court itself had held that this very same rule was "almost universally recognized" and reached the same determination itself.

[26] The dissent attempts to reframe the *Teague* analysis as follows: *Thompson* merely articulated the rule that defense counsel could not be excluded without "compelling" justification; it was not until after Ayala's conviction became final that courts recognized that the prosecutor's explanation in this case (i.e., not revealing his strategy to the defense) was "not a valid reason not to follow the norm of an adversarial proceeding."
(continued...)

violation of the Constitution, and the only remaining question as to that aspect of the case is whether the constitutional error was prejudicial.

VI.

Our dissenting colleague makes three assertions that are fundamental to her disagreement with our opinion. All are plainly erroneous and illustrate her misunderstanding of the nature of our holding. First, the dissent suggests that, because the trial court accepted the prosecutor's rationale for striking these jurors, deference to its ruling is required under AEDPA, citing *Rice v. Collins*, 546 U.S. 333, 338-39 (2006). Dissent at 125-27. Second, and along similar lines, the dissent accuses us of failing to give the state court decision the "benefit of the doubt," citing *Felkner v. Jackson*, ___ U.S. ___, 131 S.Ct. 1305, 1307 (2011). Dissent at 135. Third, the dissent assumes that Ayala must demonstrate that the individual jurors were struck for racial reasons by "clear and

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(...continued)
Dissent at 96.

To the contrary, *Thompson* directly addressed the government's argument that "an adversary hearing is inappropriate because the government lawyer is required to reveal confidential matters of tactics and strategy." *Thompson*, 827 F.2d at 1259. In that case, we rejected this claim as a general proposition and held that the determination of whether revealing case strategy could be a compelling justification in a particular case must be determined by examining whether the facts in that case warranted an exception to the general rule. *Id.* Rules applied on a case-by-case basis do not raise *Teague* issues. *See Wright v. West*, 505 U.S. 277, 308 (1992) (Kennedy, J., concurring) ("If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule.").

convincing evidence," citing 28 U.S.C. § 2254(e)(1). Dissent at 122, 126.

Each of these assertions assumes, incorrectly, that we are confronting an ordinary *Batson* challenge on habeas review — a challenge to the holding in a case in which defense counsel was able to present arguments to the trial court regarding racial bias, appeal that claim to the state appellate court, and subsequently seek reversal in federal court of the judgment that none of the jurors was struck by the prosecution for impermissible racially motivated reasons. *Rice* and *Felkner* are precisely such cases. The Supreme Court has emphasized, in such cases, that deference is required, that the petitioner must demonstrate his factual claims of prosecutorial bias by clear and convincing evidence, and that we may not give the petitioner the benefit-of-the-doubt with regard to the existence of racial prejudice. However, this case is not an ordinary *Batson* challenge, and for the reasons we have explained *supra* the dissent's approach is both inapplicable and wholly inappropriate. This, as the dissent consistently ignores, is a case in which the challenge is to the procedure employed by the trial court in conducting the *Batson* inquiry — a procedure that resulted in the denial of a fair *Batson* hearing to the defendant. Thus, it is not our task here to show that Ayala should have prevailed on his *Batson* claim, but only that he was prejudiced in his ability to prevail on that claim by the fact that his counsel was not present at the *Batson* hearing.

We cannot defer to the trial court where procedural error (such as the state supreme court found here and that the state concedes) has rendered the trial court's determination unreliable. Ayala's

counsel was excluded from *Batson* stages two and three, thus depriving him of the opportunity to persuade the trial judge that the prosecutor was motivated by racial bias. Even a very capable trial judge may overlook or fail to understand the arguments supporting racial motivation "if unassisted by an advocate." *Thompson*, 827 F.2d at 1261. Because the procedures designed to ensure a fair hearing to the defendant were not followed, we cannot afford deference to the trial court's determination of the merits of the *Batson* claim. As we concluded in *Thompson*, we "cannot rely on ... such fundamentally flawed procedures to show that that defendant suffered no prejudice." *Id.* at 1261.

Next, for similar reasons, the "clear and convincing evidence" standard has no role with regard to Ayala's challenge. The dissent's position is inherently at odds with the statutory authority on which it relies. That AEDPA provision reads as follows:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254(e)(1). We have previously held, in interpreting § 2254(e)(1), that "the presumption of correctness and the clear-and-convincing standard of proof *only* come into play once the state court's fact-findings survive any intrinsic challenge." *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004)

(emphasis added) (cited by but expressly not overruled in *Wood v. Allen*, 558 U.S. 290, 299-301 & n.1 (2010)). In *Taylor*, we explained that a state court factual finding is intrinsically flawed if "the process employed by the state court is defective," *Id.* at 999 (citing *Nunes v. Mueller*, 350 F.3d 1045, 1055-56 (9th Cir. 2003)). Here, the state court admitted that precluding Ayala's counsel from establishing a *Batson* violation at stages two and three of the state's trial court proceeding constituted procedural error. Under *Taylor*, because the state court proceeding was flawed, it is not entitled to a presumption of correctness, and Ayala is not required to demonstrate his *Batson* claim by clear and convincing evidence. The dissent's assertion is contrary to AEDPA and to *Taylor* and would simply erect an insurmountable barrier that would protect the conceded error against any effective federal review.[27]

VII.

We hold that the exclusion of Ayala and his counsel during *Batson* steps two and three constitutes prejudicial error. In the language of *Brecht*: we cannot say that had counsel been permitted to participate in the *Batson* proceedings, Ayala would have been unable to show that the prosecution violated *Batson*. To the contrary, constitutional error on the part of the state likely prevented Ayala from showing that the prosecution

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[27] There is one additional error our dissenting colleague makes that is not limited to the *Batson* context but would rewrite the law of prejudice in all habeas cases. For that reason, it deserves mention here. As we have explained *supra*, the well-established *Brecht* standard governing prejudice has not been revised or modified, and the dissent's suggestion to the contrary is without merit. *See* discussion *supra* at 46-50 & nn.12-13.

utilized its peremptory challenges in a racially discriminatory manner, and thus permitted him to be tried, convicted, and sentenced to death by a jury selected in a manner repugnant to the Constitution. Accordingly, we reverse the judgment of the district court, and remand with instructions to grant the writ and order that Ayala be released from custody unless the state elects to retry him within a reasonable amount of time to be determined by the district court.

REVERSED and REMANDED.

CALLAHAN, Circuit Judge, dissenting:

In 1985, Hector Juan Ayala shot and killed three men. In 1989, he was convicted of three counts of murder, and the jury returned a death sentence. On direct appeal his conviction and sentence were affirmed by the California Supreme Court in 2000. *People v. Ayala*, 6 P.3d 193 (Cal. 2000). The Supreme Court of the United States denied his petition for certiorari in 2001. *Ayala v. California*, 532 U.S. 908 (2001). Ayala filed his initial petition for a writ of habeas corpus in the United States District Court for the Southern District of California in 2002. This appeal is from the district court's February 17, 2009, final order denying the petition.[1]

The majority holds, based primarily on law developed after Ayala's trial, that Ayala must be released or retried because it suspects the prosecutor might have had a racial motive in recusing seven jurors. It does so by inappropriately deconstructing

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[1] There does not appear to be any question that there was sufficient evidence to convict Ayala of murder. *See Ayala*, 6 P.3d at 199-201.

the California Supreme Court's opinion to justify its evasion of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") so that it may review the state trial court's 1989 decisions *de novo*. Because Ayala's federal claim is *Teague*-barred, and because the majority's approach and conclusion are contrary to AEDPA and recent Supreme Court opinions, I dissent.

I

I agree with the district court and the State that Ayala's claim that he was deprived of his constitutional rights when his attorney was not present when the prosecutor offered his reasons for the challenged recusals, is barred under *Teague v. Lane*, 489 U.S. 288 (1989).[2]

A. The standard for determining whether a claim is barred under *Teague*.

In *Caspari v. Bohlen*, 510 U.S. 383 (1994), the Supreme Court set forth the test for determining whether a state prisoner's claim was Teague-barred:

> "[A] case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Teague v. Lane, supra*, 489 U.S. at 301. In determining whether a state prisoner is entitled to habeas relief, a federal court should apply *Teague* by proceeding in three steps. First,

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[2] Because it is clear that Ayala's claims would be *Teague*-barred if reviewed *de novo*, the majority should have begun and ended with this *Teague* analysis, rather than reach the more difficult questions regarding the standard of review under 28 U.S.C. § 2254(d).

> the court must ascertain the date on which the defendant's conviction and sentence became final for *Teague* purposes. Second, the court must "[s]urve[y] the legal landscape as it then existed," *Graham v. Collins, supra*, 506 U.S., at 468, and "determine whether a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution," *Saffle v. Parks*, 494 U.S. 484, 488 (1990). Finally, even if the court determines that the defendant seeks the benefit of a new rule, the court must decide whether that rule falls within one of the two narrow exceptions to the nonretroactivity principle. *See Gilmore v. Taylor*, 508 U.S. 333, 345 (1993).

Id. at 390 (emphasis as quoted in *Caspari*).[3]

There is no dispute that Ayala's conviction became final in May 2001, when the Supreme Court denied certiorari, and Ayala does not assert that he comes within either of the two narrow exceptions. The remaining question is whether, in May 2001, the unconstitutionality of ex parte procedure used by the trial court in 1986 was "dictated" by precedent.

B. The evolution of *Batson* as of May 2001.

In *Batson v. Kentucky*, 476 U.S. 79, 96 (1986), the

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[3] In all quotations, the parallel citations have been omitted.

Supreme Court held that "a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial." *See also Georgia v. McCollum*, 505 U.S. 42, 47 (1992). *Batson* established a three-step inquiry. First, the defendant must make a prima facie showing that the prosecution has exercised peremptory challenges in a racially discriminatory manner. *Batson*, 476 U.S. at 96. The Supreme Court stated that it had "confidence that trial judges, experienced in supervising *voir dire*, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors." *Id.* at 97. Second, "[o]nce the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors." *Id.* Third, the trial court must then "determine if the defendant has established purposeful discrimination." *Id.* at 98.

In setting forth this three-step standard, the Supreme Court specifically declined "to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges." *Id.* at 99. The Court reiterated that " [i]n light of the variety of jury selection practices followed in our state and federal trial courts, we make no attempt to instruct these courts how best to implement our holding today." *Id.* at 99 n.24. As a result, during the quarter of a century that has passed since *Batson*, courts have considered numerous ways of applying *Batson*'s three-step standard.

Ayala's primary argument is that the trial court's exclusion of him and his counsel from the proceedings in which the prosecution justified its recusal of seven jurors violated his constitutional rights to assistance of counsel at critical stages of the proceedings, to be personally present, and to assist his counsel in his defense. In response, the State argued and the district court held that in 2001, when Ayala's conviction became final, the exclusion of Ayala and his counsel from the proceedings was not a constitutional violation, and hence, Ayala's claim was barred by *Teague*, 489 U.S. 288.

The California Supreme Court, in reviewing Ayala's direct appeal, concluded that it was "almost universally recognized that ex parte proceedings following a motion regarding peremptory challenges allegedly made on the basis of improper group bias are poor procedure and should not be conducted unless compelling reasons justify them." *Ayala*, 6 P.3d at 203.

The majority claims that in May 2001 this rule had been "unequivocally 'dictated by precedent'" as a result of our opinion in *United States v. Thompson*, 827 F.2d 1254 (9th Cir. 1987). Majority at p. 72. *Thompson* concerned a 1985 criminal trial in a federal district court. The judge alone conducted voir dire and "the government used four of its peremptory challenges to exclude all four blacks in the venire." *Id.* at 1256. When Thompson's lawyer moved for a mistrial, the district court "allowed the government to put its reasons for the disputed peremptory challenges on the record, albeit in camera and out of the presence of the defendant and his lawyer." *Id.* Thompson appealed, arguing that this procedure violated his Fifth Amendment right to due process

and his Sixth Amendment right to a fair and impartial jury. *Id.* A divided panel concluded that the "district court erred in refusing to allow defense counsel in this case to hear the government's reasons for excluding the black potential jurors and to present argument thereon." *Id.* at 1261. We explained that "situations where the court acts with the benefit of only one side's presentation are uneasy compromises with some overriding necessity, such as the need to act quickly or to keep sensitive information from the opposing party. Absent such compelling justification, ex parte proceedings are anathema in our system of justice and, in the context of a criminal trial, may amount to a denial of due process."[4] *Id.* at 1258-59.

C. Ayala's Sixth Amendment claim was not dictated by precedent in 2001.

In *Horn v. Banks*, 536 U.S. 266, 272 (2002), the Supreme Court held that "a federal court considering a habeas petition must conduct a threshold *Teague* analysis when the issue is properly raised by the state," even if the state supreme court did not consider the issue. Thus, we are required to determine as a threshold matter whether Ayala's claim is *Teague*-barred. I would hold that Ayala's claim is *Teague*-barred because it was not "dictated" by Supreme Court case law, and the case Ayala relies upon, *Thompson*, did not announce a clear constitutional rule. The majority confuses the

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[4] The dissent argued that the majority's choice of an adversarial proceeding over an in camera proceeding was contrary to the Supreme Court's decision in *Batson* not to formulate particular procedures. *Id.* at 1262 (Sneed, J., dissenting).

wisdom of *Thompson* with whether that wisdom had been embraced by 2001.

Thompson is not a Supreme Court opinion and concerned a federal court trial, not a state court trial. Accordingly, it could not dictate the result in Ayala's case when his conviction became final. In *Massachusetts Delivery Ass'n v. Coakley*, 671 F.3d 33, 47 (1st Cir. 2012), the First Circuit reiterated that "[s]tate courts are not bound by the dictates of the *lower* federal courts, although they are free to rely on the opinions of such courts when adjudicating federal claims." (internal citations omitted.). Similarly, in *Bromley v. Crisp*, 561 F.2d 1351, 1354 (10th Cir. 1977), the Tenth Circuit noted that "the Oklahoma Courts may express their differing views on the retroactivity problem or similar federal questions until we are all guided by a binding decision of the Supreme Court." Also, in *U.S. ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1076 (7th Cir. 1970), the Seventh Circuit agreed that "because lower federal courts exercise no appellate jurisdiction over state tribunals, decisions of lower federal courts are not conclusive on state courts." Consistent with our sister circuits' decisions, our prior opinion in *Thompson*, which was an appeal from a federal criminal action, was not binding on the California Supreme Court.

Furthermore, even though the logic behind the opinion in *Thompson* may be compelling, the opinion does not set forth a clear rule of constitutional law. The opinion recognized that there were "occasional departures from" the norm of holding adversarial proceedings, noted a number of instances in which in camera proceedings were appropriate, and concluded that departure from the norm "may amount to a denial of due process." *Id.* at 1258-59 (emphasis

added). The language in *Thompson* is vague compared, for example, to our statement in *Menefield v. Borg*, 881 F.2d 696, 699 (9th Cir. 1989), that "we hold that the right to counsel attaches to the motion for a new trial stage."

The fact that *Thompson* did not lay down a clear rule of constitutional law is confirmed by a review of other Ninth Circuit cases as well as decisions by our sister circuits. In *Lewis v. Lewis*, 321 F.3d 824, 831 n.27 (9th Cir. 2003), we observed that "[c]ertainly, requiring a court to allow defense counsel to argue [during the three-step *Batson* process] is not clearly established law." Thus, fifteen years after *Thompson* issued, we did not think that *Thompson* established a clear rule of constitutional law. In *Majid v. Portuondo*, 428 F.3d 112 (2d Cir. 2005), the Second Circuit commented that "[i]t remains at least arguable that courts holding *Batson* hearings may, to the contrary, hear the explanations in camera and outside the presence of the defendants." *Id.* at 128 (citations omitted). In *United States v. Tucker*, 836 F.2d 334, 340 (7th Cir. 1988), the Seventh Circuit noted that the Supreme Court in *Batson* expressly declined to formulate procedures and disagreed with the Ninth Circuit's opinion in *Thompson* insofar as it required "adversarial hearings once a defendant establishes a prima facie case of purposeful discrimination." Similarly, in *United States v. Davis*, 809 F.2d 1194, 1202 (6th Cir. 1987), the Sixth Circuit commented that *Batson* does not "require the participation of defense counsel while the Government's explanations are being proffered."

The majority strives mightily to distinguish these cases on the grounds that they are not well-reasoned, in some instances are dicta, and have been rejected

by other circuits and most state courts. But the standard established by the Supreme Court for determining whether an issue is *Teague*-barred is not the merits of the old rule, or even recognition of the wisdom of the new rule, but whether the new rule was "dictated by precedent." *Caspari*, 510 U.S. at 390. These conflicting cases confirm that *Thompson* did not dictate the result in Ayala's case.

Moreover, as noted, the rule that the majority claims was established in *Thompson* is not a bright-line rule. Rather, at most, *Thompson* states that defense counsel could not be excluded absent some "compelling justification." *See* Majority at p. 76. Here, the prosecutor offered an explanation for seeking to present his reasons in camera: he did not want to reveal his strategy to the defense. Following *Thompson* and the other cases cited by the majority, it is now clear that this is not a valid reason not to follow the norm of an adversarial proceeding. [5] However, this was not firmly established in 2001 when Ayala's conviction became final.

In sum, I agree with the district court that the right to be present and have counsel present when the prosecution presented its reasons for its

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[5] The California Supreme Court carefully considered the prosecutor 's claim that his reasons for the recusals would disclose matters of strategy. It concluded that the prosecutor had "simply [given] the reasons for his challenges, reasons that defendant was entitled to hear and that disclosed no secrets of trial strategy." *Ayala*, 6 P.3d at 202-03. Accordingly, it concluded that "[i]t was unreasonable to exclude defendant from the hearings." *Id.* at 203. The California Supreme Court was right. However, for purposes of the application of *Teague*, the point is that this conclusion was neither dictated nor compelled when Ayala's conviction became final.

challenged recusals was not "dictated by precedent" when Ayala's conviction became final, and therefore the issue is *Teague*-barred.

II

Assuming the issue is not *Teague*-barred, we must next turn to the question of what exactly the California Supreme Court held and what deference it is owed. The court first acknowledged that "no particular procedures are constitutionally required" to conduct a *Batson* hearing, thereby rejecting Ayala's federal claim. *Ayala*, 6 P.3d at 202. "The next question," it said, was "whether it was error to exclude defendant from participating in the hearings on his *Wheeler* motions." It concluded that "*as a matter of state law*, it was." *Id.* at 203 (emphasis added). After conducting a thorough review of relevant state and federal precedents, it reiterated that it had "concluded that error had occurred under state law" and "noted" *Thompson*'s suggestion that the error may amount to a denial of due process. *Id.* at 204. Nonetheless, it concluded that the error was "harmless under state law, and that, if federal error occurred, it, too, was harmless beyond a reasonable doubt as a matter of federal law." *Id.* (internal citations omitted). Thus, although there may be some question as to whether the California Supreme Court actually found that there was federal error, it clearly addressed Ayala's federal claim in determining that whatever federal error occurred, it was harmless as a matter of federal law.

The majority and I part ways as to how to review this holding. Because the state court adjudicated Ayala's federal claim on the merits and rejected it, we must accord that decision deference under AEDPA. *See Johnson v. Williams*, 133 S. Ct. 1088,

1094 (2013) ("[W]hen a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary.") (internal citations omitted).

However, the majority's dislike for AEDPA drives it to try to avoid its provisions. In its initial opinion, the majority interpreted the Supreme Court's opinion in *Brecht v. Abrahamson*, 507 U.S. 619 (1993), in such a manner as to allow it to grant relief without deferring to the California Supreme Court. *See Ayala v. Wong*, 693 F.3d 945, 961-63 (9th Cir. 2012). The majority now takes a different tack in an effort to circumnavigate AEDPA and review Ayala's 1989 state court conviction *de novo*. Contrary to the Supreme Court's recent opinions, the majority deconstructs the California Supreme Court's opinion. In doing so, the majority: (1) separates the California Supreme Court's finding of error under state law from its adjudication of the federal claim; (2) decides that the California Supreme Court did not determine whether there was error under federal law; and then (3) concludes that it has "no reason to give § 2254(d) deference" to the California Supreme Court's decision. Majority at pp. 40-41.

The majority's approach is fundamentally flawed for at least two reasons. First, it is contrary to the Supreme Court's opinions directing that any question as to whether a state court considered a constitutional issue is to be resolved in favor of finding that it did. *Richter v. Harrington*, 131 S. Ct. 770, 784-85 (2011); *Johnson v. Williams*, 133 S. Ct. 1088, 1094-96 (2013). Second, by separating the California Supreme Court's determination of

Batson/Wheeler[6] error from its adjudication of the federal claim, the majority evades giving the opinion the deference demanded by AEDPA and the United States Supreme Court.

A. Supreme Court precedent compels the conclusion that the California Supreme Court decided Ayala's federal claims on their merits.

1. *The California Supreme Court's opinion.*

The California Supreme Court's evaluation of the *Batson/Wheeler* issue was clear and concise. It held that "it was error to exclude defendant from participating in the hearings on the *Wheeler* motions." *Ayala*, 6 P.3d at 203. Indeed, the California Supreme Court recognized that the error enhanced "the risk that defendant's inability to rebut the prosecution's stated reasons will leave the record incomplete." *Id.* at 204. As the majority admits, the California Supreme Court cited both *Batson* and our opinion in *Thompson* in concluding that "it seems to be almost universally recognized that ex parte proceedings following a motion regarding peremptory challenges allegedly made on the basis of improper group bias are poor procedure and should not be conducted unless compelling reasons justify them." *Ayala*, 6 P.3d at 203.

The California Supreme Court then turned to the question of prejudice and held:

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[6] As the majority notes, *People v. Wheeler*, 22 Cal.3d 258 (1978), is the California analogue to *Batson*. *See* Majority at p. 22 n.1. Accordingly, in cases arising out of California, claims that minority jurists were improperly excluded are sometimes referred to as *Batson/Wheeler* claims.

> We have concluded that error occurred under state law, and we have noted *Thompson*'s suggestion that excluding the defense from a *Wheeler*-type hearing may amount to a denial of due process. We nonetheless conclude that the error was harmless under state law (*People v. Watson* (1956) 46 Cal.2d 818, 836, 299 P.2d 243), and that, if federal error occurred, it, too, was harmless beyond a reasonable doubt (*Chapman v. California* (1967) 386 U.S. 18, 24) as a matter of federal law.

6 P.3d at 204. There can be no doubt that the California Supreme Court adjudicated the federal claim, first by implicitly rejecting it, and then, as an alternative holding, finding that any error was harmless.

2. *The majority's deconstruction of the California Supreme Court's opinion.*

The majority acknowledges this portion of the California Supreme Court's opinion. Majority at p. 30. However, it then proceeds to mull over whether the state court (a) held there was error under federal constitutional law, (b) held there was no error under federal constitutional law, or (3) did not decide whether there was error under federal constitutional law. *Id.* These are idle musings, for the "only question that matters under § 2254(d)(1)" is whether the petitioner's claim was adjudicated on the merits, and whether that adjudication was contrary to or an unreasonable application of clearly established Supreme Court precedent. *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003). Whether one agrees with the California Supreme Court's decision or not, the

federal claim was clearly adjudicated.

The majority, although purporting to accept that the California Supreme Court found constitutional error, proceeds to argue that "alternatively" the exception to deference set forth in *Richter* applies.[7] Majority at pp. 35-36. Exactly how the majority reaches this conclusion is not clear. Here is its explanation:

> *Richter* and *Williams* instruct us to afford a rebuttable presumption that a fairly presented claim was "adjudicated on the merits" for purposes of § 2254(d), but this presumption is rebuttable if there is "any indication or state-law procedural principles" supporting the conclusion that the state court did not adjudicate the federal claim on the merits. *Richter*, 131 S. Ct. at 784-85. Here, the California Supreme Court denied Ayala relief overall

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[7] This "alternate" approach, in addition to being incorrect, serves to obscure the majority's separation of the California Supreme Court's determination that there was federal constitutional error from that court's determination that any error "was harmless beyond a reasonable doubt *as a matter of federal law*." *Ayala*, 6 P.3d at 204 (internal citation omitted, emphasis added). Without its alternate approach, the majority would be hard pressed not to give the California Supreme Court's determination of harmless error the deference it is entitled to under AEDPA. This, obviously, is our primary area of disagreement. I would, applying AEDPA, defer to the California Supreme Court's opinion. The majority, instead, concocts an approach that circumvents AEDPA in order that it may review Ayala's 1989 conviction *de novo*. *See* Majority at p. 53 ("If we cannot say that the exclusion of defense counsel with or without the loss of the questionnaires likely did not prevent Ayala from p revailing on his *Batson* claim, then we must grant the writ.").

> but did so by (1) finding that the trial court committed error on state law grounds, (2) failing to make any express determination of error on federal constitutional grounds, and (3) finding any error harmless under *both* the state and federal standards for harmless error. In the context of these holdings, the rebuttable presumption that *Richter* and *Williams* instruct us to afford is, in fact, rebutted. The California Supreme Court, by finding any alleged error harmless under both the state and federal standards for harmless error, had no reason to reach the question of whether federal constitutional error occurred.

Majority at p. 36.

The majority then argues that the California Supreme Court "would have had good reason not to decide the merits of the federal constitutional issue" because courts generally do not pass on questions of constitutionality unless adjudication is unavoidable. Majority at p. 36-37. Also, by analogy it draws on cases involving claims of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), where the Supreme Court has interpreted a state court's silence as a failure to reach an issue and thus not an adjudication on the merits. Majority at p. 37-38.

The majority then proffers its vision of the law: "There are circumstances in which, even if a state court has denied relief overall, a state court's silence with respect to a fairly presented federal issue cannot be interpreted as an 'adjudication on the merits' of that issue for purposes of § 2254(d), because the

rebuttable presumption cited in *Richter* and *Williams* is rebutted by the legal principles involved (including the principle of constitutional avoidance) and factual context applicable to a particular case." Majority at p. 39. This novel approach allows the majority to assert that the "California Supreme Court had no reason to reach Ayala's federal constitutional claim," and to conclude that it has "no reason to give § 2254 deference" to the California Supreme Court's decision. Majority at pp. 39-40.

3. *The majority's approach is contrary to recent Supreme Court opinions.*

The majority's deconstruction of the California Supreme Court's opinion, besides being unnecessary dicta and unpersuasive, is contrary to recent Supreme Court opinions that were directed at the Ninth Circuit. In both *Richter*, 131 S. Ct. 770, and *Johnson*, 133 S. Ct. 1088, the Supreme Court reversed us for failing to give proper deference to the state courts' opinions.[8] Moreover, the Supreme Court set forth a clear standard that leaves no doubt that here the California Supreme Court considered Ayala's federal claims on their merits.

In *Richter*, the Court stressed that AEDPA "bars relitigation of any claim 'adjudicated on the merits in state court,' subject only to the exceptions in §§ 2254(d)(1) and (d)(2)." 131 S. Ct. at 784 (internal quotation marks omitted). The Court noted that there does not need to be "an opinion from the state court explaining the state court's reasoning," and the state court need not say it was adjudicating the

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[8] *See Richter v. Hickman*, 578 F.3d 944 (9th Cir. 2009); *Williams v. Cavazos*, 646 F.3d 626 (9th Cir. 2011).

federal claim on its merits. *Id.* It further held that, "[w]hen a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Id.* at 784-85.

Two years later, in *Williams*, a unanimous Supreme Court found it necessary to remind us of this standard. Williams challenged his conviction for first degree murder on the ground that the trial court improperly dismissed a juror. 133 S. Ct. at 1093. The California state courts denied him relief and the district court denied Williams' habeas petition. Judge Reinhardt, writing for a three-judge panel of the Ninth Circuit, held that despite the *Richter* presumption, the state courts had not adjudicated Williams' federal claim,[9] applied a *de novo* standard

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[9] The panel had reasoned:

> It is obvious, not "theoretical" or "speculat[ive]," that Williams's constitutional claim was not adjudicated at all, and so the *Richter* presumption is overcome. *Id.* at 785. Specifically, the portion of the court's opinion concerning the discharge of Juror No. 6 reveals that the court upheld his dismissal on the sole basis that the trial court had not abused its discretion in applying section 1089. That the court engaged in an extended discussion of Williams's statutory claim, but made no mention whatsoever of her more fundamental constitutional claim, is a compelling "indication" that the court either overlooked or disregarded her Sixth Amendment claim entirely, rather than that it adjudicated the claim but offered no explanation at all for its decision.

Williams v. Cavazos, 646 F.3d 626, 639 (9th Cir. 2011).

(continued...)

of review, and granted relief. *Williams*, 646 F.3d at 641, 653.

The Supreme Court firmly rejected our opinion. It first noted that the assumption that a federal claim was overlooked by the state court is wrong for a number of reasons, including: (1) "there are circumstances in which a line of state precedent is viewed as fully incorporating a related federal constitutional right,"[10] *Williams*, 133 S. Ct. at 1094; (2) "a state court may not regard a fleeting reference to a provision of the Federal Constitution or federal precedent as sufficient to raise a separate federal claim," *id.* at 1095; and (3) "there are instances in which a state court may simply regard a claim as too insubstantial to merit discussion." *Id.* The Supreme Court concluded that, "[w]hen a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits." *Id.* at 1096.

If federal courts are to presume that a state court considers a federal claim even when the court does not expressly address the claim, it follows that where, as here, the California Supreme Court's opinion clearly reflects that the court was aware of the federal claims, we must accept that the federal claims were "adjudicated on the merits," and limit

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(...continued)
The majority appears to follow a similar course in the case at bar.

[10] The Supreme Court specifically noted that "[i]n California, for example, the state constitutional right to be present at trial is generally coextensive with the protections of the Federal Constitution." 133 S. Ct. at 1094-95 (internal quotation marks omitted).

any relief according to § 2254(d). *See Richter*, 131 S. Ct. at 784.

The majority, however, seizes on the Supreme Court's statement that the presumption "can in some limited circumstances be rebutted," *Williams*, 133 S. Ct. at 1096, and adopts a definition of the exception that swallows the presumption. The majority asserts that the presumption does not apply because "it was not necessary for the state court to reject the claim of federal constitutional error on the merits in order for it to deny relief to the petitioner," and because "the facts of this case dictate the conclusion that the California Supreme Court believed that the error under state law also constituted federal constitutional error." Majority at p. 32-33. The first reason is contrary to *Williams* because the Supreme Court held that the presumption applies even where the state court regards a federal claim "as too insubstantial to merit discussion." 133 S. Ct. at 1095. The second proffered reason is also contrary to *Williams* because the Court held that the presumption applies where "state precedent is viewed as fully incorporating a related federal constitutional right." *Id.* at 1094.

Furthermore, in order to rebut the *Richter* presumption there must be "reason to think some other explanation for the state court's decision is more likely." *Richter*, 131 S. Ct. at 785. But here, there can be no doubt that the California Supreme Court did consider Ayala's federal claims, first by stating that "no particular procedures are constitutionally required" to hold a *Batson* hearing, and then, in the alternative, holding that any federal error was harmless. *Ayala*, 6 P.3d at 202-04. Thus, the California Supreme Court's opinion is not *best*

read as addressing Ayala's federal claims, as the majority admits,[11] but can *only* be so read.

In sum, a review of the California Supreme Court's opinion allows for only one conclusion: that the court considered Ayala's federal claims. Moreover, even if this conclusion was not mandated, and the presumption set forth by the Supreme Court in *Richter* and *Williams* came into play, the presumption would be controlling. Because the California Supreme Court considered Ayala's federal claims (and, in any event, must be presumed to have done so), the AEDPA standard of review applies.

B. The majority applies a *de novo* standard of review and fails to give proper deference to the California Supreme Court's opinion.

The majority's treatment of the California Supreme Court's ruling on the *Batson/Wheeler* violation is a smoke screen designed to obscure the fact that the majority reviews prejudice *de novo* rather than under the AEDPA deference standard. This approach cannot be squared with the Supreme Court's recent opinions, which require that we ask whether the California Supreme Court's determination that the error was harmless beyond a reasonable doubt was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility

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[11] The majority states: " if we were compelled to determine whether the California Supreme Court adjudicated Ayala's federal claim on its merits in favor of the petitioner or the state, we would hold without the slightest hesitation that it found that error occurred under federal constitutional law." Majority at p. 35.

of fair minded disagreement." *Richter*, 131 S. Ct. at 786-87.

1. *Deference is mandated by the statute and Supreme Court precedent.*

The applicable provisions of AEDPA are codified in 28 U.S.C. § 2254.[12] The Supreme Court's opinions hold that the AEDPA standard applies to the California Supreme Court's finding of harmless error. In *Richter*, the Supreme Court reiterated that federal habeas relief is not available "unless it is shown that the earlier state court's decision 'was contrary to' federal law then clearly established in the holdings of

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[12] Section 2254(d) reads in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

this Court," or "'was based on an unreasonable determination of the facts' in light of the record before the state court." 131 S. Ct. at 785 (internal citations omitted). Thus, it does not matter whether the California Supreme Court's determination of harmless error is a question of fact, or law, or mixed; it is entitled to deference under AEDPA.

The Supreme Court further elaborated on the applicable standard. In *Richter*, it held that a "state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." 131 S. Ct. at 786 (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). In addressing prejudice in a claim of ineffective assistance of counsel under *Strickland*, the Supreme Court held:

> [A] challenger must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." [*Strickland v. Washington*, 466 U.S. 668] at 694 [(1984)]. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687.

131 S. Ct. at 787-88. The Supreme Court again emphasized this deference when it reversed us in

Felkner v. Jackson, 131 S. Ct. 1305 (2011).[13]

2. *The majority's alternate standard of review is contrary to Supreme Court precedent.*

The majority, however, invokes *Brecht v. Abrahamson*, 507 U.S. 619 (1993), in order to justify what is, in essence, a *de novo* standard of review. Majority at pp. 49-53. The majority asserts that relief may be granted if we find that the error had a "substantial and injurious effect or influence in determining the jury's verdict," Majority at p. 49 (quoting *Brecht*, 507 U.S. at 623), or "if one cannot

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[13] Although the majority here engages in considerably more analysis than we did in *Felkner*, the Supreme Court's admonition remains instructive. The Court held:

> The *Batson* issue before us turns largely on an "evaluation of credibility." 476 U.S., at 98, n .21. The trial court's determination is entitled to "great deference," *ibid.*, and "must be sustained unless it is clearly erroneous," *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008). "
>
> That is the standard on direct review. On federal habeas review, AEDPA " imposes a highly deferential standard for evaluating state-court rulings" and "demands that state-court decisions be given the benefit of the doubt." *Renico v. Lett*, 130 S. Ct. 1855, 1862 (2010) (internal quotation marks omitted). Here the trial court credited the prosecutor's race-neutral explanations, and the California Court of Appeal carefully reviewed the record at some length in upholding the trial court's findings. The state appellate court's decision was plainly not unreasonable. There was simply no basis for the Ninth Circuit to reach the opposite conclusion, particularly in such a dismissive manner.

131 S. Ct. at 1307.

say, with fair assurance, after pondering all that happened without stripping the erroneous action for the whole, that the judgment was not substantially swayed by the error," Majority at p. 50 (quoting *Merolillo v. Yates*, 663 F.3d 444, 454 (9th Cir. 2011)), or even where a "judge feels himself in virtual equipoise as to the harmlessness of the error." Majority at p. 51 (quoting *Merolillo*, 663 F.3d at 454). That the majority essentially conceives of this as *de novo* review is obvious from its declaration that "[i]f we cannot say that the exclusion of defense counsel with or without the loss of the questionnaires likely did not prevent Ayala from prevailing on his *Batson* claim, then we must grant the writ." Majority at p. 53.

Brecht was decided before the passage of AEDPA. In *Fry v. Pliler*, 551 U.S. 112, 121 (2007), the Supreme Court held that "in § 2254 proceedings a court must assess the prejudicial impact of constitutional error in a state-court criminal trial under the 'substantial and injurious effect' standard set forth in *Brecht*." However, in doing so, the Supreme Court construed the Brecht standard as including the AEDPA standard:

> Three years after we decided *Brecht*, Congress passed, and the President signed, the [AEDPA], under which a habeas petition may not be granted unless the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States ... " 28 U.S.C. § 2254(d)(1). In *Mitchell v. Esparza*, 540 U.S. 12 (2003)

> (per curiam), we held that, when a state court determines that a constitutional violation is harmless, a federal court may not award habeas relief under § 2254 unless *the harmlessness determination* itself was unreasonable. Petitioner contends that § 2254(d)(1), as interpreted in *Esparza*, eliminates the requirement that a petitioner also satisfy *Brecht*'s standard. We think not. That conclusion is not suggested by *Esparza*, which had no reason to decide the point. Nor is it suggested by the text of AEDPA, which sets forth a precondition to the grant of habeas relief ("a writ of habeas corpus ... shall not be granted" unless the conditions of § 2254(d) are met), not an entitlement to it. Given our frequent recognition that AEDPA limited rather than expanded the availability of habeas relief, *see, e.g.*, *Williams v. Taylor*, 529 U.S. 362, 412 (2000), it is implausible that, without saying so, AEDPA replaced the *Brecht* standard of "'actual prejudice,'" 507 U.S., at 637 (quoting *United States v. Lane*, 474 U.S. 438, 449 (1986)), with the more liberal AEDPA/*Chapman* standard which requires only that the state court's harmless-beyond-a-reasonable-doubt determination be unreasonable. That said, it certainly makes no sense to require formal application of both tests (AEDPA/*Chapman and Brecht*) when the latter obviously subsumes the former.

551 U.S. at 119-20.

Three aspects of the Supreme Court's explanation are particularly important. First, the Court endorsed its prior opinion in *Esparza*, 540 U.S. 12, that habeas relief was available only if the state court's determination of harmlessness was unreasonable. *Fry*, 551 U.S. at 119. Second, the Court reiterated that AEDPA "limited ratherthan expanded the availability of habeas relief." *Id.* Third, the Court held that the *Brecht* "actual prejudice" standard requires a greater showing than the "the more liberal AEDVA/*Chapman* standard which requires only that the state court's harmless-beyond-a-reasonable-doubt determination be unreasonable." *Id.* at 119-20. *See also Brecht*, 507 U.S. at 637 (holding that habeas petitioners "are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice'"); *Pulido v. Chrones*, 629 F.3d 1007, 1020 (9th Cir. 2010) (holding that because the petitioner "did not suffer any actual prejudice, he is not entitled to habeas relief').

The majority attempts to evade the deference inherent in the AEDPA/*Brecht* standard by quoting language from *Merolillo*, 663 F.3d at 454. The majority asserts that when a judge is "in virtual equipoise as to the harmlessness of the error" and has "grave doubt about whether an error affected a jury [substantially and injuriously], the judge must treat the error as if it did so." Majority at p. 51 (citations omitted).

The majority takes this standard out of context. *Merolillo* does not suggest that the state court's opinion is not entitled to deference. Our opinion first recognized that we continue to look to the last reasoned decision of the state court, and that the state court's findings "are entitled to a presumption

of correctness unless the petitioner rebuts the presumption with clear and convincing evidence." 663 F.3d at 453 (citing 28 U.S.C. § 2254(e)(1)). Although the opinion refers to the Supreme Court's prior elucidations on harmless error, we concluded that *Brecht*'s "substantial and injurious effect" standard governs our harmless error review. *Merolillo*, 663 F.3d at 455. Our opinion also determined that applying the AEDPA/*Chapman* standard, the state court's determination of harmless error was objectively unreasonable. *Id.*

3. *Deference to the state court opinion reconciles* Brecht *and the Supreme Court's recent opinions.*

The majority fails to appreciate that even when focusing on harmlessness, a state court's factual findings are entitled to deference, *see, e.g.*, *Mansfield v. Sec'y, Dep't of Corr.*, 679 F.3d 1301, 1309 (11th Cir. 2012), and that this deference informs the definition of "grave doubt." In order to grant relief, a federal court must have "grave doubt" as to the harmlessness of the error. Critically, the Supreme Court's opinions mandate that this "grave doubt" be objective rather than subjective. Our personal perspectives as to harmlessness are not controlling. Rather, we are directed to consider whether "there is no possibility fairminded jurists could disagree" with the state court's decision, and whether there "was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 131 S. Ct. at 786-87. Thus, by definition, where fairminded jurists can disagree, there is no "grave doubt" as to the harmlessness of the error. In other words, in state habeas petitions subject to AEDPA, any objective "grave doubt" as to the

harmlessness of an error is dispelled by a determination that "fairminded jurists" could disagree.

The reach of this mandate from *Richter* can be illustrated by considering the majority's statement in a footnote. The majority opines that the California Supreme Court's conclusion that Ayala was not prejudiced was "an unreasonable application of *Chapman*.[14] *Chapman*, decided some 30 years before the passage of AEDPA, held "that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.* at 24. AEDPA does not change the constitutional standard, but it does alter the standard applied by federal courts when reviewing a state prisoner's habeas petition. AEDPA limits relief to instances where the state court adjudication was "an unreasonable application of, clearly established Federal law," or "an unreasonable determination of the facts in light of the evidence." 28 U.S.C. § 2254(d). The Supreme Court's opinions in cases such as *Richter* and *Williams* provide an objective measure for what is unreasonable under AEDPA: a state court's determination of a federal claim is unreasonable only if no fairminded jurist could agree with it.

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[14] The majority states:

> In holding that Ayala has demonstrated his entitlement to relief under *Brecht*, we therefore also hold to be an unreasonable application of *Chapman* the California Supreme Court's conclusion that Ayala was not prejudiced by the exclusion of the defense during *Batson* steps two and three or by the loss of the questionnaires.

Majority at p. 50 n.13.

In this case, consistent with the Supreme Court's opinions, a writ may not issue just because "we cannot say that the exclusion of defense counsel and the loss of questionnaires likely did not prevent Ayala from prevailing on his *Batson* claim." Majority at p. 53. Rather, a writ may issue only if we determine (using the majority's language) that there is a "grave doubt as to the harmlessness of the error," meaning that no fairminded jurist could find that the exclusion of defense counsel and the loss of questionnaires did not prevent Ayala from prevailing on his *Batson* claim.[15] *See, e.g., Richter*, 131 S. Ct. at 786-87. As set forth in the next section, fairminded jurists can concur in the California Supreme Court's determination of harmless error.

III

A review of the record shows that although the loss of the questionnaires and the exclusion of defense counsel constitute error, fairminded jurists

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[15] This approach is also consistent with the Supreme Court's opinion in *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011). There the Court held that "[i]f a claim has been adjudicated on the merits by a state court, a federal habeas petition must overcome the limitation of § 2254(d)(1) on the record that was before that state court." *Id.* at 1400. The federal court must look at the record that was before the state court and determine whether fairminded jurists could disagree with the state court's decision. Furthermore, the Court in reviewing the habeas petition in *Pinholster* applied a deferential standard of review. It held that "Pinholster has not shown that the California Supreme Court's decision that he could not demonstrate deficient performance by his trial counsel necessarily involved an unreasonable application of federal law," and that " Pinholster also has failed to show that the California Supreme Court must have unreasonably concluded that Pinholster was not prejudiced." *Id.* at 1403-04, 1408.

can agree with the California Supreme Court that those facts did not prevent Ayala from prevailing on his *Batson* claim.

A. The loss of certain prospective jurors' questionnaires.

The majority states that it is "unable to evaluate the legitimacy of some of the prosecution's proffered reasons for striking the black and Hispanic jurors because they referred to questionnaires that are now lost." Majority at p. 55. Of course, this statement misses the mark because the real question is whether the record was sufficient to allow the California Supreme Court to review Ayala's claims as he presented them to that court. A review of the California Supreme Court's opinion and Ayala's filings shows that the state court fully and fairly considered his claims. Furthermore, Ayala has not shown that the loss of certain prospective jurors' questionnaires violated his constitutional rights or that the loss prejudiced him.

First, it is critical to note what was in the record before the California Supreme Court. The record contained the voir dire transcript for all prospective jurors, the transcript of the in camera hearings on the prosecutor's reasons for the recusals, the questionnaires of all the seated jurors, and the questionnaires of the alternate jurors. What was missing were the 77-question, 17-page questionnaires the 200 or so other potential jurors had filled out.

In *Boyd v. Newland*, 467 F.3d 1139 (9th Cir. 2006), we recognized that the Supreme Court's opinion in *Miller-El v. Dretke*, 545 U.S. 231 (2005), holds that "comparative juror analysis is an important tool that courts should utilize in assessing

Batson claims." [16] *Boyd*, 467 F.3d at 1145. We commented that "comparative juror analysis" referred "to an examination of a prosecutor's questions to prospective jurors and the jurors' responses, to see whether the prosecutor treated otherwise similar jurors differently because of their membership in a particular group." *Id.* *Boyd* concluded:

> A reviewing court cannot examine the "totality of the relevant facts" and "all relevant circumstances," *Batson*, 476 U.S. at 94, surrounding a prosecutor's peremptory strike of a minority potential juror without an entire voir dire transcript. A transcript of the complete voir dire, as distinct from a partial transcript up to the time of the *Batson* motion, is proper because comparative juror analysis is appropriate both at the time of the *Batson* motion and in light of all subsequent voir dire testimony.

467 F.3d at 1151. Here, we have the entire voir dire transcript. Moreover, there is nothing in *Boyd* to suggest that in addition to the voir dire transcript, juror questionnaires from jurors who are not selected are essential to a determination of the totality of the relevant facts.

Indeed, the opposite conclusion can be drawn from our treatment in *Boyd* of a California rule requiring

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[16] We further held that the right to a comparative juror analysis explicitly set forth in *Miller-El* was not *Teague*-barred as it "simply illustrates the means by which a petitioner can establish, and should be allowed to establish, a *Batson* error." *Boyd*, 467 F.3d at 1146 (internal citation omitted).

an indigent defendant to show some cause in order to receive a free transcript of voir dire. We held, citing *United States v. MacCollum*, 426 U.S. 317, 322-23 (1976), that the California rule did not violate the Constitution, but that the state court erred in failing to recognize that the defendant had raised a plausible *Batson* claim entitling him to a transcript of voir dire. *Boyd*, 467 F.3d at 1151. If a defendant can be required to show some cause in order to receive a transcript of voir dire, it follows that a defendant has no *per se* right to the preservation of all questionnaires filled out by prospective jurors who were not seated.

To be fair, there is language in our en banc opinion in *Kesser v. Cambra*, 465 F.3d 351 (9th Cir. 2006) (en banc), that could be read to infer a right to juror questionnaires. We concluded that: "In this case, an evaluation of the voir dire transcript and juror questionnaires clearly and convincingly refutes each of the prosecutor's nonracial grounds, compelling the conclusion that his actual and only reason for striking [a juror] was her race." *Id.* at 360. But this statement shows only that where juror questionnaires are available, we will consider them, not that the questionnaires are necessary. Instead, we commented that a comparative juror analysis was appropriate because "[w]e too have a transcript of voir dire and a *Batson* claim fairly presented, and that is all *Miller-El* requires." *Id.* at 361.

In addition, we recently commented on the lack of questionnaires of excused jurors in *Briggs v. Grounds*, 682 F.3d 1165 (9th Cir. 2012). *Briggs* concerned a *Batson* challenge to a state court conviction where the federal record did not contain the questionnaires of excused jurors. *Id.* at 1170. In

affirming the district court's denial of relief, the majority noted:

> The dissent seems to conclude that because we cannot independently verify the answers from the questionnaires as they are not in the record, the defense's characterization is equally, if not more, plausible despite the state court determinations to the contrary. However, "AEDPA imposes a highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt," *Felkner v. Jackson*, [*sic*] 131 S. Ct. 1305, 1307 (2011) (per curiam) (internal quotation marks omitted) (overturning the Ninth Circuit). The dissent's readiness to doubt the state court determination based on the defendant's characterization of the record does not apply the appropriate level of deference Congress and the United States Supreme Court have required of us.

Id. at 1170-71. The majority in *Briggs* further noted that "it is widely acknowledged that the trial judge is in the best position to evaluate the credibility of the prosecutor's proffered justifications." *Id.* at 1171 (internal citations omitted). Citing the Supreme Court's statements in *Rice v. Collins*, 546 U.S. 333, 338-39 (2006), that a "federal habeas court can only grant Collins' petition if it was unreasonable to credit the prosecutor's race-neutral explanations for the *Batson* challenge," we stated in *Briggs* that:

> it would be anathema to AEDPA if we were to assume that the petitioner's contentions about the questionnaires are

> true simply because the record before us does not contain the excused jurors' questionnaires. The burden to disprove the factual findings rests with Briggs. 28 U.S.C. § 2254(e)(1) (requiring "clear and convincing evidence" to rebut "a determination of a factual issue made by a State court").

Id.

It follows that the lack of prospective jurors' questionnaires does not relieve Ayala of his burden to show by clear and convincing evidence that the California Supreme Court was wrong in determining that the prosecutor was not biased. Accordingly, we must determine whether Ayala has shown that the lack of these questionnaires in his case renders the record insufficient for a determination of his federal claim. He fails in this task for several reasons.

First, the California Supreme Court reasonably rejected Ayala's claim that his constitutional rights were infringed by the loss of the bulk of prospective juror questionnaires. It explained:

> The deficiency of which he complains is the absence of certain questionnaires, which were completed by prospective jurors, then lodged with the superior court, subsequently lost by its clerk's office, and finally determined by the superior court to be beyond reconstruction. A criminal defendant is indeed entitled to a record on appeal that is adequate to permit meaningful review. That is true under California law. [Citation.] It is true as well under the United States

> Constitution — under the Fourteenth Amendment generally, and under the Eighth Amendment specifically when a sentence of death is involved. [Citation.] The record on appeal is inadequate, however, only if the complained-of deficiency is prejudicial to the defendant's ability to prosecute his appeal. ([*People v. Alvarez*, 14 Cal.4th 155,] at p. 196, fn.8 [1996]).

Ayala, 6 P.3d at 208. The California Supreme Court concluded that if the loss of the questionnaires was error under either federal or state law, "it was harmless beyond a reasonable doubt." *Id.* This determination is reasonable and entitled to deference. *Rice*, 546 U.S. at 338-39.

Second, the determination is reasonable because the missing juror questionnaires are not critical to Ayala's federal claims. The questionnaires of the 70 or so jurors who were never called are not relevant because Ayala does not allege, let alone show, that the potential jurors were excused due to constitutionally forbidden reasons.

Third, none of the prosecutor's stated reasons for recusing the questioned jurors relied solely, or even primarily, on the jurors' questionnaires. Rather, in each instance the prosecutor mentioned the juror's specific answers to questions posed on voir dire. In a couple of instances the prosecutor referenced a person's questionnaire, but this was primarily to explain why the prosecutor found the individual's oral responses troubling.

Finally, Ayala has ably presented his specific *Batson* challenges based on the voir dire transcript

and the extant questionnaires of the seated jurors and alternates. Although Ayala argues that the lost questionnaires might support his arguments, such a contention can be made about any lost document. If such speculation constituted prejudice, the standard would be reduced to a *per se* rule.

B. Challenges to the Individual Jurors

The remaining issue is whether Ayala has shown by clear and convincing evidence that no reasonable jurist could have credited the prosecutor's non-discriminatory reasons for excusing the seven jurors in issue. In other words, whether at least one fairminded jurist could agree with the California Supreme Court's opinion. The majority discusses only three of the jurors in its opinion, but a review of the prosecutor's reasons for excusing each of the seven jurors shows that the California Supreme Court's determination that "the challenged jurors were excluded for proper, race-neutral reasons" was reasonable. *See Ayala*, 6 P.3d at 204.

1. *Olanders D.*

Olanders D. was one of the first jurors challenged by Ayala. The trial court held that Ayala had not met the first prong of the *Batson* test (a prima facie showing that the challenge was based on race, *see Kesser*, 465 F.3d at 359), but nonetheless indicated that it would hear the prosecutor's reasons for the recusal in order to have a complete record. The prosecutor stated in the ex parte proceeding:

> My primary concern with regard to [Olanders D.] is his ability to vote for the death [sentence] during the penalty phrase. On his questionnaire he indicated that he does not believe in the death

> penalty. He did indicate that his view had changed over the last several years. He told us that he did want to serve. During the time that he was questioned, I felt that his responses were not totally responsive to the questions of either counsel for the defense or myself.
>
> My observations in reading his questionnaire and before even making note of his racial orientation was that his responses on the questionnaire were poor. They were not thought out. He demonstrated a lack of ability to express himself well. And his answers did not make a lot of sense. As a result, I felt that he is not a person who could actively participate in a meaningful way in deliberations with other jurors, and his ability to fit in with a cohesive group of 12 people I sincerely question, and it was for that reason plus his stand on the death penalty that led me to believe that I did not want him on this jury.

The trial judge responded:

> Okay. Certainly with reference to whether or not he would get along with 12 people, it may well be that he would get along very well with 12 people. I think the other observations of counsel are accurate and borne out by the record.

The California Supreme Court held that the record showed that the challenged jurors were excluded for proper, race-neutral causes. *Ayala*, 6 P.3d at 204. Addressing Olanders D., the court

commented:

> [T]he prosecutor stated he had exercised the challenge in part because his questionnaire indicated he opposed the death penalty. The prosecutor acknowledged Olanders D.'s oral statements that his views had changed, but commented that his answers were "not totally responsive to the questions of either counsel for the defense or myself." He further stated, in essence, that Olanders D.'s difficulties in communicating led him to question whether he would "fit in" on the jury. The court disagreed with the latter point, noting, "it may well be that he would get along very well with 12 people," but added: " I think the other observations of counsel are accurate and borne out by the record."

Id. The California Supreme Court further noted that the trial court "credited the prosecutor's opinion[] that Olanders D. opposed the death penalty." *Id.* at 206.

The majority claims that the prosecutor's motives for excusing Olanders D. is suspect for several reasons. First, Ayala "could have pointed to seated white jurors" who similarly expressed hesitancy to impose the death penalty. Majority at p. 57. Second, the majority asserts that its review of the voir dire transcript shows that "Olanders D.'s answers were responsive and complete." Majority at p. 58. Third, it claims that the responses of a seated white juror were just as unresponsive. Majority at p. 59. The majority concludes that none of the reasons proffered

by the prosecutor should be sustained because one was rejected by the trial judge, "two failed to distinguish the juror whatsoever from at least one seated white juror," and the fourth cannot be evaluated because his questionnaire was lost. Majority at p. 60.

Were we reviewing the trial judge's decision *de novo*, the majority's approach might be persuasive. But the applicable standard is whether no fairminded judge could agree with the California Supreme Court's determination that the juror was excluded for proper, race-neutral reasons. *See Richter*, 131 S. Ct. at 786. Ayala does not come close to meeting this standard.

There is no suggestion that any seated juror raised a similar set of concerns as Olanders D. The trial judge, who had the opportunity to observe Olanders D., agreed with the prosecutor that Olanders D. was ambivalent about the death penalty, had not been responsive on his questionnaire, and lacked the ability to express himself clearly. Moreover, the trial judge did not necessarily reject the prosecutor's concern that Olanders D. could not participate in a meaningful way in jury deliberations, but rather only commented that it "may well be that he would get along very well with 12 people [on the jury]." The trial court's determinations as affirmed by the California Supreme Court are presumed correct. *Rice*, 546 U.S. at 338-39 ("State-court factual findings, moreover, are presumed correct; the petitioner has the burden of rebutting the presumption by 'clear and convincing evidence.' § 2254(e)(1).").

The majority's expressed concerns about Olanders D.'s recusal are far from compelling. It is hardly

surprising that a number of potential jurors expressed ambivalence about the death penalty. The fact that a prosecutor is more concerned with one potential juror's ambivalence than another is not necessarily a sign of racial prejudice. Similarly, the fact that the majority in reviewing the voir dire transcripts thinks that a seated juror's responses were no more responsive than Olanders D.'s is really of little moment. As noted, the trial judge — who heard Olanders D.'s voir dire — agreed with the prosecutor that he "demonstrated a lack of ability to express himself well." The majority's supposition that Olanders D.'s questionnaire responses may not have been "poor" is not clear or convincing evidence of anything. At most, the majority's arguments and assumptions may suggest that the prosecutor's evaluation of Olanders D. was not compelled, but none of them really question the sincerity of the prosecutor's reasons or suggest a likelihood of some unstated improper motive. The majority fails to show that a fairminded jurist could not have agreed with the California Supreme Court.

The only indicia of possible racial bias was the fact that seven of the eighteen peremptory challenges exercised by the prosecutor excused African-American and Hispanic jurors. If this were enough to compel a finding of racial bias, there would be no reason for the second and third steps in the *Batson* standard or for deference to the trial court's determinations. The lack of any compelling evidence of racial bias is clear when the record in this case is compared to the prosecutor's statements in *Kesser*, 465 F.3d 351. There, in overcoming the deference due to the state court's determinations, we commented: "The racial animus behind the prosecutor's strike is clear. When he was asked to explain why he used a

peremptory challenge to eliminate [a juror], he answered using blatant racial and cultural stereotypes." *Id.* at 357. Here, in contrast, all the majority can do is suggest that other jurors, like Olanders D., were uncomfortable with the death penalty, failed to offer thoughtful answers, and did not communicate well. But even if the prosecutor's perceptions about Olanders D. were incorrect or not unique, that fact would not be such compelling evidence of pretext as to justify a failure to defer to the California Supreme Court's reasoned determination that the jurors were excused for proper, race-neutral reasons.

2. *Gerardo O.*

Gerardo O. was one of the recusals that Ayala challenged in his second objection. The prosecutor explained his challenge to Gerardo O. as follows:

> I made an observation of [Gerardo] when he first entered the courtroom on the first day that the jurors were called into the area.
>
> At that time, he appeared to not fit in with anyone else. He was a standoffish type of individual. His dress and his mannerisms I felt were not in keeping with the other jurors.
>
> He indicated to us at the beginning that he was illiterate. Actually, his words were that he was illiterate, and that he therefore had the questionnaire translated to him, so that he could make responses.
>
> I observed him on subsequent occasions when he came to the court, and observed

> that he did not appear to be socializing or mixing with any of the other jurors, and I also take into account his responses on the questionnaire and in the *Hovey* questioning process, at which time he expressed that he had no feeling with regard to the death penalty in writing.
>
> When being questioned, he said that he was not sure if he could take someone's life, or if he could take someone's life into his hands.
>
> He further responded in the *Hovey* process that there would be eleven other people, that he felt a little shaky as far as his responsibilities in this case.
>
> For those reasons, I felt that he would be an inappropriate juror, and for that reason, I exercised the peremptory challenge.

The trial court accepted the prosecutor's reasons. It noted that the record supported the prosecutor's observations and commented that the recusal was based on Gerardo O.'s individual traits. The California Supreme Court in rejecting Ayala's *Wheeler/Batson* claim noted that "Gerardo O. struggled with English and did not understand the proceedings." *Ayala*, 6 P.3d at 206.

The majority does not deny that Gerardo O. stated that he was illiterate, or that he needed someone to fill out his questionnaire, or that he dressed differently, or that he did not mix with the other jurors. *See* Majority at pp. 61-65. Instead, the majority speculates that Ayala's lawyer might have shown that despite his own comments, Gerardo O.

was not illiterate, and that Geraldo O.'s "dress and mannerisms were distinctly Hispanic."[17] Majority at p. 62. It further muses that the prosecutor's comments concerning Gerardo O.'s manner and aloofness and his ambivalence toward the death penalty could have been pretexts for an underlying racial bias.[18] Majority at pp. 64-65. Of course, it is impossible to negate such possibilities, but there is

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[17] The majority's cited quote from *Hernandez v. New York*, 500 U.S. 352 (1991), demonstrates that *Hernandez* is not applicable to this case. The Supreme Court noted "the prosecutor's frank admission that his ground for excusing these jurors related to their ability to speak and understand Spanish raised a plausible, though not a necessary, inference that language might be a pretext for what in fact were race-based peremptory challenges." *Id.* at 363. Here, the prosecutor did not mention any concern with Gerardo O.'s ability to speak Spanish and there does not appear to be any indication that any juror's ability to speak Spanish was an issue. Instead, the majority, having poured over the record to determine that Gerardo O., despite his own admission of illiteracy, had "attended college in the United States," opines that he "was perfectly capable of reading the summary of legal issues that was given to prospective jurors." Majority at p.6 1-62. It then leaps to the unsupported conclusion that the prosecutor's purported reason for striking Gerardo O. was directly related to his status as someone who spoke Spanish as his first language. Majority at p. 62. The majority's speculation may not be illogical, but it is far from compelling.

[18] The majority also suggests that Gerardo O.'s ambivalence to the death penalty was no more pronounced than some seated white jurors. Majority at pp. 64-65. As previously noted, the potential jurors' attitudes toward the death penalty was an important consideration for both the defense and the prosecution. The fact that the prosecutor distinguished between levels of ambivalence that the majority over twenty years later argues are indistinguishable is hardly a sign of pretext. Moreover, there is no doubt that Gerardo O.'s qualifications — professed illiteracy, distinctive dress and aloofness, and ambivalence to the death penalty — were unique.

nothing but the majority's imagination to fuel its assertions.[19] Here, the trial judge agreed with the prosecutor's observations of Gerardo O. and the California Supreme Court affirmed. The majority has not presented the type of clear evidence that the United States Supreme Court has held is necessary to overcome our deference to state court findings. *See Rice*, 546 U.S. at 338-39.

3. *Robert M.*

Robert M. was one of the last persons whose recusal was challenged. The prosecutor explained his reasons as follows:

> As far as [Robert M.] is concerned, Miss Michaels and I had discussions during the selection process here in court, even as late as immediately before the exercise of the last challenge.

The court would note that I had passed at one point, leaving [Robert M.] on.

> I have always felt some degree of reluctance with regard to [Robert M.], and my concern primarily is in the area of whether, after conviction, [Robert M.] would actually vote for the death penalty, and it was my view that taking all of his responses in *Hovey* into account, and the — some of his responses even as late as yesterday — for example, the following of the Sagon Penn case. It was Miss Michaels

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[19] The majority goes so far as to fantasize that "perhaps" unbeknownst to the trial judge, Gerardo O. "had even organized a dinner for some of them at his favorite Mexican restaurant." Majority at p. 63.

doing the questioning at that time, and I did not actually — it would have been possibly a disadvantage or a disservice to inquire further as to his impressions about the Sagon Penn case.

I'm concerned about that case because the fact that Mr. Penn, in a very notorious trial here, was found not guilty in a second trial, and allegations of misconduct with regard to the District Attorney's office and the police were certainly rampant in that case.

There's really no way for me to inquire as to where [Robert M.] actually stood.

As far as [Robert M.] is concerned, our scores, a combination of all the factors — Mr. Cameron graded [Robert M.] as a four, Miss Michaels had rated [Robert M.] as a five, and my score on him was four to a five, somewhere in that area.

I had before doing any of the selection process, resolved that at the very best, we would not wish to have any jurors on this case whose combined score was five or less.

In spite of that, I passed once on him, but it is my view, basically, that because of his attitudes with regard to the death penalty, such as in his first response to whether he would always vote for — well, in the question number one about whether he would always vote for guilt, he indicated that it was a difficult question.

> He said that he believed in the death penalty, but it was hard for him to be involved in the death penalty.
>
> With regard to questions about whether he would vote for death, he said no, it would be hard to say, no, I don't know what the evidence is, and Miss Michael's reasons, which she expressed to me, and I have to agree with, is a great degree of concern about whether if we get to that point he could actually vote for death, and having that kind of a question in my mind as I'm trying this case would be distracting and worrisome to me during the process of the trial.

The trial judge accepted the prosecutor's reasons, noting that although Robert M. "is certainly pro the death penalty," his answers varied and "there may well be a legitimate concern as to whether or not he could impose it." The court further noted that "an appropriate use of a peremptory would be for a person that any party feels either could not vote for death or could not vote for life." In affirming Ayala's conviction the California Supreme Court observed "that Robert M. was less than desirable from the prosecution's point of view." *Ayala*, 6 P.3d at 206.

Again, the majority does not really question the prosecutor's reasons, but speculates that had Ayala's counsel been present he might have argued that Robert M.'s reluctance to impose the death penalty was not different from other jurors' reluctance. Majority at pp. 66-67. In addition, the majority does not deny that Robert M. had stated that he had

followed the Sagon Penn case, but argues that he only mentioned this briefly.[20] Majority at p. 68. Nonetheless, Robert M.'s interest in a recent notorious criminal case that involved misconduct by the prosecutor and resulted in a not guilty verdict is a legitimate non-discriminatory reason for recusal by the prosecutor.

4. *The Other Jurors*

The only other recused juror that the majority mentions is George S. *See* Majority at p. 56-57 n.16. The prosecutor explained that he had recused George S. because he (a) stated that he had sat on a prior jury and "was the one hold-out with regard to whatever issue was being presented at that time"; (b) was equivocal on the death penalty, (c) had been rejected as a police officer candidate, and (d) placed undue emphasis on the Bible. The trial judge commented that the prosecutor's observations were accurate. The majority does not deny that the prosecution offered these individualized grounds for the recusal. Instead, the majority dismisses the fact that George S. had been a holdout juror with the comment that it was a civil action and speculates

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[20] The extent of the majority's speculation is illustrated by its argument that because another juror who was seated mentioned that he was aware of the capital case *People v. Harris*, 623 P.2d 240 (Cal. 1981), the prosecutor 's concern with Robert M.'s interest in the Sagon Penn case may have been pretextual. Majority at pp. 67-68. This argument assumes that somehow the *Harris* case was similar to the Sagon Penn case. This seems unlikely as the crime in *Harris* took place in 1978, some eleven years before the jury selection process in this case. Moreover, unlike the alleged verdict in the Sagon Penn case, Harris was found guilty and the California Supreme Court's opinion, which issued in 1981, did not find any serious misconduct by the district attorney.

that George S.'s alleged emphasis on the Bible "cannot be evaluated at all" because of the loss of the questionnaires. *See* Majority at p. 56 n.17. Again, perhaps the majority's assertions suggest that the prosecutor's views were not compelled, but they do not really undermine their reasonableness or sincerity.

There were valid nondiscriminatory grounds for recusing the remaining three minority jurors. Galileo S. was recused because he (a) displayed a non-conformist attitude to the justice system, (b) had more run-ins with the law than he admitted, and (c) had an attitude that might create alienation and hostility on the part of other jurors. Luis M. was challenged because he (a) expressed ambivalence on the death penalty, (b) had investigated the case on his own, and (c) left the military with a low rank suggesting some sort of misconduct or inability to perform. Barbara S. was challenged because (a) her responses to oral questions were slow, (b) she had an empty look in her eyes and seemed out of tune with what was going on, and (c) her written and oral answers were incomplete and non-responsive.

As with the other recused jurors, the prosecution team offered individualized reasons for each of these recusals. There is no blatant racism, no reference to stereotypes (veiled or otherwise), and no discernable pattern of discrimination in the reasons advanced by the prosecution. Nonetheless, these recusals are susceptible to the type of speculative challenges that the majority hurls at the recusals of Olanders D., Gerardo O., and Robert M. In all likelihood, other jurors expressed ambivalence and equivalence about the death penalty, other jurors offered slow or incomplete responses, and other jurors probably had

been denied employment or performed poorly in a job. These might be appropriate avenues to explore at the time that a recusal is made. But we are reviewing a 1989 state trial pursuant to AEDPA, and the Supreme Court in its recent opinions has reiterated that (a) *Batson* issues turn largely on evaluations of credibility, (b) the trial court's determination is entitled to great deference, (c) the determination must be sustained unless it is clearly erroneous, and (d) AEDPA demands that state-court decisions be given the benefit of the doubt. *See Felkner*, 131 S. Ct. at 1307.

The California Supreme Court may not have been compelled to conclude that "the challenged jurors were excluded for proper, race-neutral reasons." *Ayala*, 6 P.3d at 204. But its conclusion was objectively reasonable. That is, Ayala has not shown that the California Supreme Court's ailing "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 131 S. Ct. at 786-87. As in *Richter*, the majority's opinion "illustrates a lack of deference to the state court's determination and an improper intervention in state criminal processes, contrary to the purpose and mandate of AEDPA and to the now well-settled meaning and function of habeas corpus in the federal system." *Id.* at 787.

IV

The Supreme Court decided *Batson v. Kentucky* in 1986, a year after Ayala killed three men and three years before his murder conviction. In *Batson*, the Supreme Court declined "to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges." 476 U.S. at 99.

I would hold that Ayala's claim that he had a constitutional right to have counsel present when the prosecutor offered its reasons for the challenged recusals was not dictated by precedent when Ayala's conviction became final, and thus is *Teague*-barred.

Ultimately, however, this case turns on the reasonableness of the California Supreme Court's 2000 opinion that the absence of defense counsel and the loss of jury questionnaires were harmless error beyond a reasonable doubt as a matter of federal law. *Ayala*, 6 P.3d at 204. Following the Supreme Court's pointed guidance in *Richter*, 131 S. Ct. 770, and *Williams*, 133 S. Ct. 1088, we must conclude that the California Supreme Court adjudicated Ayala's federal claims on their merits and thus apply AEDPA's deferential standard of review.[21]

This standard of review mandates that we determine whether fairminded jurists could agree with the California Supreme Court. In other words, we can grant relief only if no fairminded jurist could find that the exclusion of defense counsel and the loss of questionnaires did not prevent Ayala from prevailing on his *Batson* claim. Here, the evidence of valid non-pretextual reasons for the prosecutor's recusals renders the state court's decision objectively reasonable.

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[21] I do not agree with some of the majority's characterizations of my dissent. I have set forth my reasons in this dissent and trust the reader will be able to discern the respective merits of the majority and dissent without further assistance. To the extent the majority accuses me of relying heavily on recent Supreme Court opinions such as *Richter*, 131 S. Ct. 770, *see* Majority at p. 51-52, n. 14, the accusation is accurate.

Because the majority fails to appreciate that Ayala's federal claim is *Teague*-barred, and applies a *de novo* standard of review, despite the Supreme Court's contrary directions, I dissent.

Filed October 23, 2006

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

HECTOR JUAN AYALA, Petitioner,

vs.

ROBERT L. AYERS, JR., Acting Warden of the California State Prison at San Quentin, Respondent.[1]

Case No. 01cv1322-IEG(PCL)

ORDER DENYING PETITIONER'S MOTION FOR SUMMARY JUDGMENT ON GROUP 2 CLAIMS AND DENYING REQUEST FOR EVIDENTIARY HEARING; GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT ON GROUP 2 CLAIMS

Petitioner Hector Juan Ayala and Respondent Steven Ornoski have moved for summary judgment on Petitioner's Group 2 claims which include Grounds 1, 2, 4, 5, and of his Third Amended Petition. The parties have filed opposition and reply briefs.

A hearing was held before Chief Judge Irma E. Gonzalez on August 15, 2006. Anthony Dain and Tiffany Salayer appeared on behalf of Petitioner. Steven Oetting of the California Attorney General's Office appeared on behalf of Respondent. Following the hearing, upon the Court's request, the parties also filed supplemental briefs on the possible implications of two recent Ninth Circuit decisions on

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[1] Robert L. Ayers, Jr. is the is the current Acting Warden at San Quentin, and the Court directs the Clerk to reflect this in the case caption.

the Group 2 claims.

Upon consideration, the Court DENIES Petitioner's motion for summary judgment and GRANTS Respondent's motion for summary judgment on the Group 2 claims.

OVERVIEW

By an amended information filed on January 20, 1987, Petitioner Hector Juan Ayala ("Petitioner") and his brother Ronaldo Medrano Ayala were charged with the murders of Jose Luis Rositas, Marcos Antonio Zamora and Ernesto Dominguez Mendez. The information alleged that the murders were committed on or about April 26, 1985, during a robbery attempt where the brothers held four men captive in an automobile repair shop. Both men were also charged with the attempted murder of Pedro Castillo, who was shot during the drug-related robbery attempt, but who escaped and survived. At trial, the prosecution also presented evidence that a third man, Jose Moreno, helped in the commission of these crimes. Castillo provided the information to police that led to the arrests and was the key prosecutors witness at trial.

Petitioner was convicted on August 1, 1989, of three counts of first-degree murder in violation of California Penal Code ("CPC") § 187, one count of attempted murder in violation of CPC §§ 664 and 187, and one count of robbery and three counts of attempted robbery in violation of CPC §§ 664 and 211 — each count with findings that Petitioner used a firearm in the commission of the crimes in violation of CPC § 12022.5. Petitioner was also found guilty of the two special circumstance allegations, multiple murder under CPC § 190.2(a)(3), and murder in the

attempted commission of a robbery under CPC § 190.2(a)(17)(1). The jury returned a verdict of death for each of the three murders on August 31, 1989, and the court entered judgment in accordance with the verdict on November 30, 1989.

Petitioner filed his opening brief on automatic appeal to the California Supreme Court on April 23, 1998, raising nineteen (19) separate issues. The California Supreme Court denied the appeal on August 28, 2000. *People v. Ayala*, 24 Cal. 4th 243 (2000). On November 15, 2000, the state court denied the petition for rehearing.

On August 9, 1999, Petitioner filed a habeas petition with the California Supreme Court, raising three (3) grounds for relief. Petitioner was not granted an evidentially hearing on those claims and his petition was summarily denied on the merits on August 30, 2000. On March 15, 2001, Petitioner filed a Writ of Certiorari with the United States Supreme Court, which was denied on May 14, 2001. On May 14, 2001, his judgment became final.

On July 20, 2001, Petitioner filed a request for appointment of counsel to handle his federal habeas petition. Petitioner filed an initial petition in this court on May 14, 2002. After later filing a Second Amended Petition in this court on December 13, 2002, Petitioner filed a second state habeas petition in the California Supreme Court on March 17, 2003. The state petition was filed in order to exhaust several unexhausted claims.

Petitioner filed his Third Amended Petition with this court on December 9, 2004. On April 11, 2006, the Court denied Petitioner's request for an evidentially hearing regarding Petitioner's Group 1

Claims (Claims 12 and 13) and granted Respondent's motion for summary adjudication of those claims.

STANDARD OF REVIEW

Title 28, United States Code, § 2254(a), sets forth the following scope of review for federal habeas corpus claims:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody *in violation of the Constitution or laws or treaties of the United States.*

28 U.S.C. § 2254(a) (West 1994) (emphasis added).

In *Lindh v. Murphy*, 521 U.S. 320, 336 (1997), the United States Supreme Court held that the new provisions of the Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA") "generally apply only to cases filed after the Act [AEDPA] became effective." In capital habeas actions, cases are typically commenced by the filing of requests for appointment of counsel and stays of execution of the petitioners' death sentences. Petitioner filed his request for appointment of counsel and stay of execution on April 27, 2001 and filed his petition with this Court on May 6, 2002. The AEDPA became effective on April 24, 1996, when the President signed it into law. *See id.* Accordingly, the AEDPA applies to this case.

Relevant to this case are the changes AEDPA rendered to 28 U.S.C. § 2254(d), which now reads:

> (d) An application for a writ of habeas

> corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C.A. § 2254(d)(1)-(2) (West Supp. 2005). "A state-court decision is 'contrary to'... clearly established precedents if it 'applies a rule that contradicts the governing law set forth in our cases' or if it 'confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [that] precedent.'" *Early v. Packer*, 537 U.S. 3, 8 (2002) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000)). A state court decision involves an "unreasonable application" of clearly established federal law "if the state court identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular state prisoner's case" or "if the state court either unreasonably extends a legal principle from [the Supreme Court's] precedent to a new context where it should not apply or unreasonably refuses to extent that principle to a new context where it should apply." *Williams*, 529 U.S. at 407.

Even when the federal court undertakes an independent review of the record in the absence of a reasoned state court decision, the federal court must "still defer to the state court's ultimate decision." *Pirtle v. Morgan*, 313 F.3d 1160, 1167 (9th Cir. 2002). If the state court decision does not furnish any analytical foundation, the review must focus on Supreme Court cases to determine "whether the state court's resolution of the case constituted an unreasonable application of clearly established federal law." *Greene v. Lambert*, 288 F.3d 1081, 1089 (9th Cir. 2001). Federal courts also look to Ninth Circuit law for persuasive authority in applying Supreme Court law and to determine whether a particular state court decision is an "unreasonable application" of Supreme Court precedent. *Davis v. Woodford*, 384 F.3d 628, 638 (9th Cir. 2004).

TEAGUE v. LANE

The United States Supreme Court, addressing perceived inconsistencies in its prior rulings regarding retroactive application of its decisions, held that "new" constitutional rules of criminal procedure will not be applied retroactively to cases on collateral review unless they fall within two narrow exceptions. *Teague v. Lane*, 489 U.S. 288 (1989). A new rule is one that "breaks new ground or imposes a new obligation on the States or the Federal Government" or one whose "result was not dictated by precedent existing at the time defendant's conviction became final." Id. at 301. The two exceptions to the *Teague* rule are: (1) rules placing certain kinds of private individual conduct beyond the power of the criminal law to prohibit, and (2) procedures implicit in the concept of ordered liberty without which the likelihood of an accurate conviction is seriously

diminished. *Penry v. Lynaugh*, 492 U.S. 302, 305 (1989); *Graham v. Collins*, 506 U.S. 461, 478 (1993).

When the state properly argues that a "defendant seeks the benefit of a new rule of constitutional law, the court must apply *Teague* v. Lane before considering the merits of the claim." *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994). Under *Teague*, habeas relief is generally unavailable if it is based "on a rule announced after [a petitioner's] conviction and sentence became final." *Id.* Therefore, the court must first ascertain the date on which a petitioner's conviction became final. *Id.* The second step in a *Teague* analysis is to determine whether a state court considering the contested claim would have felt compelled by existing precedent to conclude that the rule petitioner seeks was required by the Constitution at the time his or her conviction became final. *Id.* at 389-90. Third, if the court determines that a petitioner is seeking relief under a new rule, the court must then decide if that rule falls under one of the two exceptions to *Teague*. *Id.* at 390.

The Court must determine whether the decision Petitioner relies upon announces a new rule. If it does, and if neither *Teague* exception applies, Petitioner may not rely upon that case. Even if Petitioner does not seek to apply a decision creating a new rule, "it is necessary to inquire whether granting the relief sought would create a new rule because the prior decision is applied in a novel setting, thereby extending the precedent." *Stringer v. Black*, 503 U.S. 222, 228 (1992), referencing *Butler v. McKellar*, 494 U.S. 407, 414-415 (1990).

Respondent asserts that this Court is barred from deciding the merits of Claims 1, 2 and 5, as those three claims propose the creation of new rules of

criminal procedure which are barred under *Teague*. (Answer to Third Amended Petition ["Ans."] at 22, 27, 31.) Petitioner disputes Respondent's position, maintaining that these claims are not *Teague*-barred, and arguing that "[w]hether a rule of law is 'new' is dictated by what the controlling law was at the time Petitioner's state court judgment became final." (Petitioner's Motion for Summary Adjudication ["Pet. MSA"] at 7.) Petitioner argues that this Court is bound by Ninth Circuit precedent in applying Supreme Court law, and that Ninth Circuit holdings can create a 'clearly established' rule of law under *Teague*.

Regarding Claims 1 and 2, Petitioner points to the Ninth Circuit holding in *United States v. Thompson*, 827 F.2d 1254 (9th Cir. 1987), as evidence that those claims do not involve a new rule of law under *Teague*. (Pet. MSA at 8-9.) Petitioner does not make any argument regarding the inapplicability of *Teague* to Claim 5, instead arguing against the application of *Teague* to Claim 4. (*Id.* at 16.) Respondent does not assert a *Teague*-bar on Claim 4.

The California Supreme Court denied Petitioner's direct appeal on August 28, 2000, and denied rehearing on November 15, 2000. The United States Supreme Court denied certiorari on May 14, 2001, at which time Petitioner's conviction became final.[2] Under *Teague*, Petitioner may not avail himself of a decision announced after his conviction was finalized, or advocate a decision by this court, which creates a

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[2] Respondent erroneously states the standard, as a "new rule" for *Teague* purposes is one that was established after a petitioner's *conviction became final* and not at the time of his trial. *Teague*, 489 U.S. at 301.

new rule of criminal procedure.

1. Claims 1 and 2

In Claim 1, Respondent maintains that "at the time of his (Petitioner's) trial, there were no clearly established rules of criminal procedure requiring counsel for the defense to be present when a prosecutor sets forth his reasons for peremptorily challenging jurors under *Batson v. Kentucky*." (Respondent's Motion to Dismiss ["Resp. MTD"] at 2.) In Claim 2, Respondent asserts that "at the time of his trial there was no established rule of criminal procedure that a defendant had a right to be personally present when the prosecution provided its reasons for peremptorily challenging a juror under *Batson*." (*Id.* at 19.) Respondent then aptly asserts that requiring a prosecutor to state these reasons in the presence of defense counsel and the defendant, with the failure to do so constituting structural trial error, creates a new rule of criminal procedure that was not clearly established at the time Petitioner's conviction became final. (*Id.* at 12-13, 19-20.)

Petitioner submits that in 1987, well before Petitioner's judgment became final, the Ninth Circuit held that a "district court erred in refusing to allow defense counsel in this case to hear the government's reasons for excluding the black potential jurors and to present argument thereon." (Pet. MSA at 7-9.), citing *United States v. Thompson*, 827 F.2d 1254, 1261 (9th Cir. 1987). More recently, however, the Ninth Circuit has noted that it is not "clearly established" whether defense counsel must be permitted to make any argument to rebut the prosecutor's proffered race-neutral reasoning for excluding prospective jurors:

> One can argue that a court must allow defense counsel to present argument during the three-step inquiry, unless the record clearly shows that a decision in the defendant's favor is warranted. After all, the defendant bears the ultimate burden of persuasion, *see Batson*, 476 U.S. at 98, 106 S.Ct. at 1712, and has only been allowed to establish a prima facie case before step three. However, this argument appears not to have been addressed by courts. *Certainly, requiring a court to allow defense counsel to argue is not clearly established law.* Nonetheless, it seems wise for courts to allow counsel to argue, if only to remove some of the burden of record evaluation from the court.

Lewis v. Lewis, 321 F.3d 824, 831 fn.27 (9th Cir. 2003) (emphasis added). If a defendant does not have a clearly established right to offer a rebuttal to a prosecutor's proffered reasons for exercising a peremptory challenge, it cannot be said that it is clearly established that the defendant and his counsel must be present while the prosecution's proffer is made.

Respondent concedes that under Ninth Circuit precedent, circuit authority can suffice to create a clearly-established rule of law under *Teague*. (Resp. MTD at 16); *Leavitt v. Arave*, 383 F.3d 809, 819 (9th Cir. 2004); *Bell v. Hill*, 190 F.3d 1089, 1093 (9th Cir. 1999). Respondent also notes that other circuit courts disagree with the Ninth Circuit on whether circuit authority can create a clearly established rule of law under *Teague*. *See Soffar v. Cockrell*, 300 F.3d 588,

598 (5th Cir. 2002) (en banc). Petitioner cites no *Supreme Court* authority in existence as of the date his conviction became final which would have compelled reasonable state jurists to conclude that trial counsel and Petitioner were constitutionally entitled to be present at the *Batson* inquiry. In addition, as the Ninth Circuit held in *Lewis*, the rules Petitioner seeks to apply to the instant case are not clearly established rules of law under *Teague*. The proposed rules do not concern private individual conduct nor do they concern procedures implicit in the concept of ordered liberty, and therefore do not fall within either exception to *Teague*. Thus, Claims 1 and 2 propose the application of new rules of criminal procedure, and are barred under *Teague v. Lane*.

2. Claim 5

Respondent argues that, [a]ny requirement that the state court was required for the first time on appeal to allow comparison of the responses of jurors who were allegedly excused on the basis of race with those who were not would amount to a new rule of criminal procedure," and is thus barred under *Teague v. Lane*. (Resp. MTD at 24.) Respondent also argues that "the Ninth Circuit has concluded, at the time of Petitioner's direct appeal, there was no clearly established law *requiring* a comparative juror analysis on appeal." (*Id.*); *Boyd v. Newland*, 393 F.3d 1008, 1014-15 (9th Cir. 2004); *Kesser v. Cambra*, 392 F.3d 327, 342-44 (9th Cir. 2004) (emphasis added). Petitioner did not initially offer any *Teague* argument on Claim 5.

The Ninth Circuit has held that comparative juror analysis, as outlined in *Miller-El v. Dretke*, 545 U.S. 231 (2005), merely clarifies the Supreme Court's holding in *Batson* by offering another potential tool

for the courts to utilize in analyzing such claims, and does not establish a new rule of criminal procedure. *Boyd v. Newland*, 455 F.3d 897, 904-06 (9th Cir. 2006). The Ninth Circuit in *Boyd* rejected the contention that the claims regarding comparative analysis were *Teague*-barred, and ruled on the merits of the claim. *Id.* at 904. Respondent acknowledged this point in the supplemental briefings ordered by the Court. (Respondent's Supplemental Briefing "Resp. SB" at 4.) Thus, Petitioner's Claim 5 argument does not propose the application of a new rule of criminal procedure, and is not barred under *Teague v. Lane*.

DISCUSSION OF MERITS OF PETITIONER'S CLAIMS

1. Claims 1 and 2 — the Exclusion of Petitioner and his Counsel from the Wheeler/Batson hearings

Notwithstanding the Court's finding that Petitioner's Claims 1 and 2 are *Teague*-barred, the Court will also discuss the merits of those claims. Petitioner alleges that the trial court's exclusion of defense counsel from the hearing during which the prosecutor proffered its reasons for exercising peremptory challenges resulted in a "violation of his constitutional rights to an adversarial hearing, to assistance of counsel during a critical stage of the proceedings against him, to a reliable determination of his death penalty, and to due process." (Third Amended Petition ["Pet."] at 14.) Petitioner further alleges that the trial court's exclusion of him personally resulted in a "violation of his constitutional rights to be personally present...." (Pet. at 21.)

A. Factual Background

Jury selection began in Petitioner's case on January 17, 1989. [2 RT 41] The selection process was divided into three phases: screening for hardship, individual sequestered voir dire pursuant to *Hovey v. Superior Court*, 28 Cal.3d 1 (1998), and general voir dire. This process took three-and-a-half months. During the group voir dire, the defense brought three motions pursuant to *People v. Wheeler*, 22 Cal.3d at 258, California's equivalent to *Batson v. Kentucky*, 476 U.S. at 79, claiming the prosecution was improperly exercising its peremptory challenges against minority prospective jurors on the basis of their race or ethnic background. [50 RT 6094-97; 6217-18; 51 RT 6344-50.]

The trial court asked the prosecution to explain its reasons for the challenges. [50 RT 6094-95; 50 RT 6217-18; 51 RT 6344.] The prosecutor stated he did not wish to reveal his strategy and requested that the court hold an ex parte hearing from which defendant and his counsel would be excluded. [50-1 RT 6184-86.] Defense counsel stated that he had no objection to being excluded from discussions of strategy, but that "I think I am entitled to be present" otherwise, in case the prosecution's "statement is a misstatement of the facts" and to "make sure the record is clear as to what the statement of facts is." [50 RT 6096.] The court overruled defense counsel's objection and held three ex parte hearings. Following each hearing, the trial court ruled that the prosecutor was not challenging jury panelists because of race or ethnicity. [50-1RT 6186; 51-1 RT 6307; 51-1 RT 6358.]

B. The California Supreme Court's Ruling

The California Supreme Court denied Petitioner's claim that the trial court erred in excluding him and his counsel from the three ex parte hearings. The California Supreme Court first laid out the legal standard to be applied in ruling upon a defendant's challenge under *Wheeler* and *Batson*. *Ayala*, 24 Cal. 4th 243, 259-269.

> "Under *Wheeler*, there is a presumption that a prosecutor uses his peremptory challenges in a constitutional manner. [Citation.] The defendant bears the burden to show; prima facie, the presence of purposeful discrimination. [Citation.] If he succeeds, the burden shifts to the prosecutor to show its absence." (*People v. Alvarez* (1996) 14 Cal. 4th 155, 193 [58 Cal. Rptr. 2d 385, 926 P.2d 365].)
>
> The details of the procedure for conducting an inquiry on a claim of improper group bias against prospective jurors are well known. In the first step of the three-part *Wheeler* inquiry, "'[i]f a party believes his opponent is using his peremptory challenges to strike jurors on the ground of group bias alone, he must raise the point in timely fashion and make a prima facie case of such discrimination to the satisfaction of the court. First,... he should make as complete a record of the circumstances as is feasible. Second, he must establish that the persons excluded are members of a cognizable group within the meaning of the representative cross-section rule. Third, from all the

> circumstances of the case he must show a strong likelihood [or reasonable inference] that such persons are being challenged because of their group association....'" (*People v. Box* (2000) 23 Cal. 4th 1153, 1187-1188 [99 Cal. Rptr. 2d 69, 5 P.3d 130].) Next, the burden shifts to the challenged party to provide a race-neutral explanation for the exercise of peremptory challenges. (*People v. Hayes* (1999) 21 Cal. 4th 1211, 1284 [91 Cal. Rptr. 2d 211, 989 P.2d 645].) At the third step of the *Wheeler* challenge process—the determination by the trial court whether the opponent of the peremptory challenge has proved purposeful racial discrimination—the trial court must consider at least two possibilities. If the prosecutor acknowledges that he challenged a prospective juror for an impermissible reason (*see U.S. v. Thompson* (9th Cir. 1987) 827 F.2d 1254, 1256, fn. 1), then, of course, the *Wheeler* motion must be granted. If the prosecutor does not so state, but instead offers the court race-neutral reasons, it must still determine whether those stated reasons are untrue and pretextual. (*People v. Alvarez, supra*, 14 Cal. 4th 155, 196.)

Id. at 260-61. The California Supreme Court noted that the United States Supreme Court has established no particular procedures which are constitutionally required:

> Provided that the inquiry proceeds within the general framework just

> articulated, no particular procedures are constitutionally required. As the United States Supreme Court said of *Batson* hearings, "It remains for the trial courts to develop rules, without unnecessary disruption of the jury selection process, to permit legitimate and well-founded objections to the use of peremptory challenges as a mask for race prejudice." (*Powers v. Ohio* (1991) 499 U.S. 400, 416 [111 S.Ct. 1364, 1374, 113 L.Ed.2d 411].) "The response of courts across the country has created a rather wide spectrum, ranging from those that recommend an adversary proceeding of some type to those that permit the prosecutor's explanation to be received in camera and ex parte." (*Gray v. State* (1989) 317 Md. 250, 257 [562 A.2d 1278, 1281].)

Id. at 261.

The California Supreme Court initially rejected the trial court's implicit ruling that the prosecution's reasons for exercising the peremptory challenges were matters of trial strategy justifying an *ex parte* hearing. *Id.* at 262. The Court further concluded that because no matters of trial strategy were revealed, it was error "as a matter of state law" to exclude defendant from participating in the hearings. *Id.* In finding that the procedure was erroneous under state law, the California Supreme Court relied heavily upon the Ninth Circuit's decision in *United States v. Thompson*, 827 F.2d 1254 (9th Cir. 1987):

> The question whether ex parte communications are proper in ruling on a *Wheeler* motion has not arisen in

California decisional law. But the same or closely related issues have arisen in federal and other state cases discussing analogous motions brought under *Batson v. Kentucky*, *supra*, 476 U.S. 79. While some decisions have tolerated an ex parte Batson hearing procedure on the ground that the United States Constitution permits it (*U.S. v. Tucker* (7th Cir. 1988) 836 F.2d 334, 340; *U.S. v. Davis* (6th Cir. 1987) 809 F.2d 1194, 1202), it seems to be almost universally recognized that ex parte proceedings following a motion regarding peremptory challenges allegedly made on the basis of improper group bias are poor procedure and should not be conducted unless compelling reasons justify them. (*People v. Hameed* (1996) 88 N.Y.2d 232, 237-238 [644 N.Y.S.2d 466, 469, 666 N.E.2d 1339, 1342]; *U.S. v. Roan* Eagle (8th Cir. 1989) 867 F.2d 436, 441; *Gray v. State*, *supra*, 317 Md. 250, 257-258 [562 A.2d 1278, 1282]; *U.S. v. Tindle* (4th Cir. 1988) 860 F.2d 125, 132-133 (conc. & dis. opn. of Murnaghan, J.); *U.S. v. Garrison* (4th Cir. 1988) 849 F.2d 103, 106; *U.S. v. Tucker*, *supra*, 836 F.2d at p. 340; *U.S. v. Gordon* (11th Cir. 1987) 817 F.2d 1538; *Goode v. Shoukfeh* (Tex. 1997) 943 S.W.2d 441, 452, 40 Tex. Sup. Ct. J. 487 [civil case].) We agree.

U.S. v. Thompson, *supra*, 827 F.2d 1254, presented the issue and the countervailing values involved: "The question presented to us is... whether the district judge erred by permitting the

[prosecutor] to state her reasons to him ex parte and then ruling on the objection without divulging the reasons to defense counsel. In resolving this issue we must consider and reconcile two fundamental principles of our criminal justice system. The first is that the district judge has broad discretion to fashion and guide the procedures to be followed in cases before him. [Citations.] The second principle is that adversary proceedings are the norm in our system of criminal justice, [citation], and ex parte proceedings the disfavored exception." (*Id.* at p. 1257.)

U.S. v. Thompson, *supra*, 827 F.2d 1254, further explained: "The right of a criminal defendant to an adversary proceeding is fundamental to our system of justice. [Citations.] This includes the right to be personally present and to be represented by counsel at critical stages during the course of the prosecution. [Citation.] This is not mere idle formalism. Our system is grounded on the notion that truth will most likely be served if the decisionmaker-judge or jury-has the benefit of forceful argument by both sides....

"There are, to be sure, occasional departures from this norm. The district judge makes an ex parte review of the prosecution's evidence to determine whether it falls within the rule of *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196, 10 L.Ed.2d 215 (1963). [Citations.]

> Also, the district judge normally considers on an ex parte basis whether to reveal to the defense the identity of a government informant. [Citation.] But, as these examples illustrate, situations where the court acts with the benefit of only one side's presentation are uneasy compromises with some overriding necessity, such as the need to act quickly or to keep sensitive information from the opposing party. Absent such compelling justification, ex parte proceedings are anathema in our system of justice and... may amount to a denial of due process." (*U.S. v. Thompson, supra*, 827 F.2d 1254, 1258-1259, fn. omitted.)
>
> In addition to the foregoing general considerations, it is error in particular to conduct ex parte proceedings on a *Wheeler* motion because of the risk that defendant's inability to rebut the prosecution's stated reasons will leave the record incomplete.

Ayala, 24 Cal. 4th at 262-264.

The California Supreme Court found, however, that the state law error, and any federal error that may have occurred, was harmless. *Id.* at 268-69. In concluding that the error was harmless, the Court closely examined the record of the voir dire. Based upon that review the Court concluded as follows:

> In summary, the record reveals the following facts in support of the view that the prosecutor was not engaged in racial or ethnic discrimination. The court

credited the prosecutor's opinions that Olanders D. opposed the death penalty, that Barbara S. was in a dazed state, that George S. had been a holdout juror and had been rejected for a law enforcement position, and that Robert M. was less than desirable from the prosecution's point of view. Galileo S., among other deficiencies, had (unless the prosecutor was misleading the court) not been honest regarding his criminal past. Luis M. admitted that he had investigated the case. Gerardo O. struggled with English and did not understand the proceedings. A prosecution committee, including a psychologist, gave Barbara S., George S., and Robert M. poor or mediocre suitability ratings. George S.'s surname is not obviously Spanish, and the prosecutor stated that he was unaware of his Hispanic heritage.

On these facts, we are confident that the prosecutor was not violating *Wheeler*, and that defense counsel's presence could not have affected the outcome of the *Wheeler* hearings. [FN3 omitted] Moreover, the trial court's rulings in the ex parte hearing indisputably reflect both its familiarity with the record of voir dire of the challenged prospective jurors and its critical assessment of the prosecutor's proffered justifications. To the extent the rulings expressed agreement with the prosecutor's characterizations of the prospective jurors and their responses, they also support the court's implicit conclusion that the prosecutor did not

> fabricate his justifications and they were grounded in fact.

Id. at 266-67. The Court recognized the theoretical possibility that exclusion of a defendant from an ex parte *Wheeler* hearing may result in an incomplete record. *Id.* at 267. The Court found, however, "[o]n this well-developed record... we are confident that defense counsel could not have argued anything substantial that would have changed the court's rulings. Accordingly, the error was harmless." *Id.* at 268.

Finally, the California Supreme Court rejected the contention that the error violated Petitioner's right to be present and to be represented by counsel, finding any federal constitutional error also to be harmless. *Id.* at 269.

C. Discussion

Assuming that Claims 1 and 2 are not *Teague*-barred, those claims fail on their merits. In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Supreme Court first held that the United States Constitution prohibits a prosecutor from exercising a peremptory challenge solely on the basis of race. Evaluating whether a peremptory challenge was race-based under *Batson* is a three-step process, requiring that (1) the defendant must demonstrate a prima facie case that the prosecutor challenged the contested jurors due to their race, (2) if the defense made a prima facie showing of discrimination, the burden shifts to the prosecution to articulate racially-neutral explanations for those challenges, then (3) the trial court must determine if the defendant met his burden of proving purposeful discrimination. *Batson*, 476 U.S. at 96-98. At the final step, the trial court

must "evaluat[e] 'the persuasiveness of the justification' proffered by the prosecutor, but 'the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike'." *Rice v. Collins*, ___ U.S. ___, 126 S. Ct. 969, 974 (2006) (quoting *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (*per curiam*)).

The Supreme Court has never suggested the exact manner in which trial courts must gather evidence necessary to make its determination that the exercise of a peremptory challenge was (or was not) motivated by racial animus. In Batson, the Court specifically left it to the lower courts to "formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges." *Id.*, 476 U.S. at 99 & fn.24 Seizing upon this language, both the Sixth and Seventh Circuit Courts of Appeals have concluded that a trial court does not err in allowing a prosecutor to explain his or her reasons for exercising a peremptory challenge in an ex parte proceeding outside the presence of the defense. *United States v. Tucker*, 836 F.2d 334, 337-40 (7th Cir. 1988); *United States v. Davis*, 809 F.2d 1194, 1201-02 (6th Cir. 1987). In *Tucker*, the Seventh Circuit noted that *Batson* itself "does not require rebuttal of the Government's explanation by defense counsel" nor does it "require the participation of defense counsel...." 836 F.2d at 339; *see also Davis*, 809 F.2d at 1202 ("Once the defendants had established a prima facie case of racial motivation sufficient for the district court to make an inquiry of the Government, there was nothing more defendants were required to do. Their participation was no longer necessary for the district court to make its determination.")

Subsequent to the Sixth and Seventh Circuits

decisions, the Supreme Court acknowledged, albeit in dictum, that "[i]n the rare case in which the explanation for a challenge would entail confidential communications or reveal trial strategy, an *in camera* discussion can be arranged." *Georgia v. McCollum*, 505 U.S. 42, 58 (1992). Just last year, the Second Circuit again noted that "there also remains doubt whether the defense enjoys the even more rudimentary right to be allowed access to the prosecution's race-neutral explanations in the first place." *Majid v. Portuondo*, 428 F.3d 112, 128 (2d Cir. 2005).

In the face of this authority tending to demonstrate that there is no clearly established federal law prohibiting the trial court from holding *ex parte Batson* proceedings, Petitioner relies upon *United States v. Thompson*, 827 F.2d 1254 (9th Cir. 1987), as well as the general right of a defendant to be present during critical stages of a felony trial in arguing that he is entitled to relief. In *Thompson*, the Ninth Circuit noted that "[a]bsent ... compelling justification, ex parte proceedings are anathema in our system of justice and, in the context of a criminal trial, may amount to a denial of due process." *Id.* at 1258-59. The court held that the because the prosecutor's proffered reasons for exercising a peremptory challenge were not strategy-related, the trial court erred in excluding defendant and his counsel from those proceedings. *Id.* at 1259. Petitioner in this case also relies upon general authority establishing that voir dire is a critical stage of the felony criminal proceeding, during which the defendant has a right, derived from the Confrontation Clause of the Sixth Amendment, to be present. *Gomez v. United States*, 490 U.S. 858, 873 (1989) (citing *Lewis v. United States*, 146 U.S. 370,

374 (1892)).

The California Supreme Court concluded that the trial court abused its discretion in finding that the reasons proffered by the prosecutor for exercising the peremptory challenge involved trial strategy. *Ayala*, 24 Cal. 4th at 262. The California Supreme Court also concluded that it was an error of *state law* for the trial court to hold those proceedings *ex parte*. *Id.* The California Supreme Court did not, however, express an opinion as to whether the exclusion of Petitioner and his counsel was error of constitutional magnitude. In light of the express holdings of the Sixth and Seventh Circuits in *Tucker*, 836 F.2d at 337-40 and *Davis*, 809 F.2d at 1201-02, the *ex parte* proceedings were not constitutional error, as well as the Supreme Court's acknowledgment in *McCollum*, 505 U.S. at 58 that *in camera* discussions are sometimes appropriate, the Court doubts whether the trial court's procedure was constitutionally defective as a matter of clearly established Federal law.

Even assuming that the trial court erred in hearing the prosecutor's reasons for exercising his peremptory challenges outside of the presence of Petitioner and his counsel, however, the state court's determination that such error was harmless was neither "contrary to [n]or an unreasonable application of clearly established Federal law." *Williams*, 529 U.S. at 412-13. Petitioner argues that exclusion of he and his counsel was structural error, requiring automatic reversal. Petitioner argues that "where assistance of counsel has been denied entirely or during a critical stage of the proceeding," prejudice is presumed and reversal is required. *Mickens v. Taylor*, 535 U.S. 162, 166 (2002); *United States v.*

Cronic, 466 U.S. 648, 659 fn.25 (1984). Petitioner also relies upon the Ninth Circuit's analysis in *Thompson*, finding the exclusion of defendant and his counsel from the *Batson* hearing to be *per se* reversible because "[t]he government cannot rely on a transcript reflecting such fundamentally flawed procedures to show that the defendant suffered no prejudice." *Thompson*, 827 F.2d at 1261.

As an initial matter, the Ninth Circuit's decision in *Thompson* is materially distinguishable from this case. The prosecutor in *Thompson* relied in part upon the juror's race as the basis for exercising the peremptory challenge. *Id.*, 827 F.2d at 1256, fn.1. In addition, the trial judge in *Thompson* made no explicit findings on the record regarding the strength or weakness of the prosecutor's proffered reasons. In this case, the reasons offered by the prosecutor did not contain a hint of racial bias. The trial judge who had presided over the entire voir dire process was well aware of the standards and made explicit findings on the record evaluating the credibility of the prosecutor's proffered reasons. Finally, *Thompson* was a direct appeal of a federal criminal judgment, not a collateral attack on a state court judgment under 28 U.S.C. § 2254, such that different standards of review applied. For these reasons, the Court finds the Ninth Circuit's decision in *Thompson*, that exclusion of a defendant or his attorney from an *ex parte Batson* hearing is *per ser* reversible, to be inapplicable to this case.

In general, the error alleged by Petitioner here does not fall within the circumstance where per se reversal is required. The Supreme Court has never held that the exclusion of a defendant from a critical stage of his criminal proceedings constitutes a

structural error. *Campbell v. Rice*, 408 F.3d 1166, 1172 (9th Cir. 2005). "To the contrary, in *Rushen v. Spain*, 464 U.S. 114, 117 (1983) (per curiam), the Court determined that the fact that the defendant was denied the right to be present during an *ex parte* communication between the judge and a juror was trial error subject to harmless error analysis." *Campbell*, 408 F.3d at 1172. Furthermore, as Petitioner acknowledges, *Mickens* holds only that prejudice is presumed where counsel "has been denied entirely or during a critical stage." *Id.*, 535 U.S. at 166. Petitioner was not completely deprived of counsel during the voir dire in this case. Therefore, the California Supreme Court's decision that any federal constitutional error in excluding Petitioner and his counsel from the *ex parte Batson* proceedings was subject to harmless error analysis was not contrary to or an unreasonable application of clearly established Federal law. *Williams*, 529 U.S. at 412-13.

Finally, Petitioner has not shown that the California Supreme Court's decision finding the purported error to be harmless was objectively unreasonable within the meaning of AEDPA. *Mitchell v. Esparza*, 540 U.S. 12, 18 (2003) (before habeas relief may be granted under AEDPA, federal court must determine that the state court applied the harmless-error review in an "objectively unreasonable" manner). The California Supreme Court went to great lengths to review the reasons proffered by the prosecution, and the trial court's evaluation of those reasons. *Ayala*, 24 Cal. 4th at 264-266. Upon such review, the California Supreme Court concluded that the trial court's exclusion of Petitioner and his counsel from the proceedings "could not have affected the outcome of the [*Batson*]

hearings." *Id.* at 267. The California Supreme Court also discussed and distinguished the Ninth Circuit's opinion in *Thompson*, noting there was nothing in the record to suggest any impropriety in the prosecutor's exercise of his peremptory challenges. *Id.* at 267-68.

The Court has reviewed the record of the voir dire. As discussed in detail below with regard to Petitioner's Claim 4, the Court finds the prosecutor's proffered non-discriminatory reasons for exercising each of the peremptory challenges was amply supported by the record. This is not a case where the prosecutor offered patently inappropriate or even marginal reasons for striking the jurors. The Court finds that the state court's harmless error analysis was not objectively unreasonable. Petitioner is not entitled to relief on Claims 1 and 2.

2. Claim 4 — Equal Protection rights of prospective jurors

Petitioner alleges that the "ex parte, in camera *Batson* proceedings violated the equal protection rights of the seven minority prospective jurors who were the subjects of those proceedings," resulting in a violation of Petitioner's due process rights. (Pet. at 23.) Respondent argues that this claim was rejected on the merits by the, California Supreme Court. (Ans. at 29.)

A. California Supreme Court's Opinion

In the direct appeal opinion, the state supreme court concluded:

> In tandem with his *Wheeler* claim, defendant also maintains that the ex parte proceedings make it impossible to

> determine whether race-based exclusion may have occurred, to the detriment of prospective jurors who enjoy a right under the equal protection clause not to be discriminated against in jury selection on the basis of race. (*Powers v. Ohio, supra,* 499 U.S. 400, 409, [111 S.Ct. 1364, 1369-1370].) Again, on the record before us, we are confident that no such exclusion occurred. The prosecutor articulated, at a minimum, plausible criteria for his excusals, the trial court agreed that the excusals were proper, and to the extent the written record before us touches on the prosecutor's stated reasons, it confirms that they were not pretextual.

Ayala, 24 Cal. 4th at 269.

B. Discussion

As set forth above, the Supreme Court in *Batson v. Kentucky*, 476 U.S. 79 (1986), first held that the United States Constitution prohibits a prosecutor from peremptorily challenging potential jurors solely on the basis of race. Evaluating whether a peremptory challenge was race-based under *Batson* is a three-step process, requiring that (1) the defendant must demonstrate a prima facie case that the prosecutor challenged the contested jurors due to their race, (2) if the defense made a prima facie showing of discrimination, the burden shifts to the prosecution to articulate racially-neutral explanations for those challenges, then (3) the trial court must determine if the defendant met his burden of proving purposeful discrimination. *Id.*, 476 U.S. at 96-98.

The Supreme Court has also held that a prosecutor's race-based exclusion of jurors can constitute a violation of the Equal Protection rights of those jurors, which a petitioner does have standing to challenge even when the prospective jurors in question do not share racial identity with him or her. *Powers v. Ohio*, 499 U.S. 400 (1991). State law allows for significant trial court discretion and acknowledges that a peremptory challenge may be based on a broad range of evidence intimating juror partiality. *People v. Wheeler*, 22 Cal.3d 258, 275 (1978).

Petitioner argues that while the California Supreme Court rejected this claim on direct appeal, the state court's review of the record was "illusory" because it "failed to include participation, and a record made, by the defense." (Pet. MSA at 16.) Petitioner concludes that, as the state supreme court failed to properly apply clearly established federal law, habeas relief should be granted on this claim. (*Id.*)

Respondent maintains that the California Supreme Court "correctly identified and applied *Batson*," and the state court's decision was not contrary to or an unreasonable application of controlling precedent. (Resp. MTD at 21-22.) Respondent further argues that the trial prosecutor offered specific reasons for challenging each prospective juror in question and the California Supreme Court found those reasons to be race-neutral. (*Id.* at 22.)

State supreme court factual findings are presumed to be correct absent clear and convincing evidence to the contrary. *Rice v. Collins*, ___ U.S. ___, 126 S.Ct. 969, 974 (2006); *Mitleider v. Hall*, 391 F.3d

1039, 1046-48 (9th Cir. 2004). At trial, defense counsel argued that of the seven minority prospective jurors who were the subject of the prosecution's peremptory challenges, that it is "clear that these jurors are not significantly different from the white jurors that the prosecution has chosen to leave on the jury both in terms of their attitudes on the death penalty, their attitudes on the criminal justice system, and their attitudes on the presumption of innocence and burden of proof, that I'm more concerned with generally." [51 RT 6347.] The trial court then stated that this showing "will make a prima facie case of discrimination based on group, and will request a further clarification from the people." [*Id.*] Then, in an ex parte hearing, the prosecution disclosed to the trial court their reasons for a number of their peremptory challenges.

The prosecution stated that their challenge of prospective juror Galileo S. was because they found him to be a "nonconformist person who has had numerous run-in's with the law," who had "three or four more arrests than those that he has told us about," with arrests for drunk driving and drugs among the list. [50 RT 6184-85.] The trial court noted for the record that the information about the additional arrests was "shared with defense counsel prior to group questioning." and also agreed with the prosecution that Galileo S. had "a healthy paranoia, if you will, concerning the justice system." [*Id.* at 6185.]

The prosecution opined that their primary concern with Olanders D. was "his ability to vote for death during the penalty phase." [*Id.*] The prosecution added that "[o]n his questionnaire he indicated that he does not believe in the death

penalty. He did indicate that his view had changed over the years." [*Id.*] The prosecution was also concerned by his "lack of ability to express himself well" and said that his answers "did not make a lot of sense." [*Id.*] The court concluded that counsel's observations were "accurate and borne out by the record." [*Id.* at 6186.]

When the next set of prospective jurors were challenged or accepted, the defense objected, stating that two individuals challenged by the prosecution consisted of "one hundred percent of the jurors of Hispanic extraction that have gotten in the jury box." [50 RT 6217.] The trial court replied: "Again, I don't think the record at this point is sufficient for a prima facie showing. However, again I'm going to request an independent statement for the record with reference to the people's challenge of both Hispanic jurors." [*Id.* at 6218.]

The prosecution stated, again during an ex parte hearing, that the challenge of Luis M. was partly due to the fact that "he has had second, or perhaps third thoughts with regards to the death penalty." [51 RT 6305.] In addition, the prosecution was uncomfortable with the jury including "a person who went out and investigated the case" and "left the military at the rank of E-2, suggesting some sort of misconduct or inability." [*Id.*] The prosecution felt that Gerardo O. was a "standoffish type of individual" and had concerns about the fact that he "indicated to us at the beginning that he was illiterate ... and that he therefore had the questionnaire translated to him, so that he could make responses." [*Id.* at 6306.] The prosecution also noted that Gerardo O. said he was not sure if he could "take someone's life into his hands" and felt "a

little shaky" about his responsibilities as a juror in this case. [*Id.* at 6306-07.]

The prosecution stated that they used a peremptory challenge on George S. [51 RT 6351] for multiple reasons, including the fact that "he was one hold-out" in his prior jury service, that he placed "undue emphasis on the Bible" and opined that "God would punish" those who did wrong and that he "applied and was rejected back in 1969 to be a police officer," which caused them to speculate on the "psychological aspects" of his rejection. [*Id.* at 6351-52.] The prosecutor also stated that he was "not aware that he was Hispanic" until the defense protested the peremptory challenge, as he thought the prospective juror was maybe of "Greek" ancestry. [*Id.* at 6352-53.]

The prosecutor stated that the challenge of Barbara S. was due to the fact that he "thought there was something wrong" with her, as "her responses were extremely slow," "her answers did not make sense" given the questions asked, and the prosecution suspected she was "possibly under the influence of drugs." [*Id.* at 6354-55.] The prosecutor added that he believed Barbara S. appeared "somewhat angry" upon her initial entrance into court, and displayed "a great deal of nervousness." [*Id.* at 6355.] The trial court did not agree with the prosecution's characterization of her demeanor, opined that many prospective jurors were nervous, and stated that Barbara S. did not appear to be hostile. [*Id.* at 6356.] However, the court did concur with prosecution's notice of the "incomplete, if you will, answers, non sequiturs." [*Id.*]

The prosecution stated that they felt reluctance regarding whether Robert M. would actually vote for

the death penalty, and were concerned with his interest in "following of the Saigon Penn case." [*Id.* at 6356-57.] The prosecution noted that Robert M. said while he believed in the death penalty it would be "hard for him to be involved in the death penalty." [*Id.* at 6357-58.] The trial court noted Robert M.'s agreement with the idea of the death penalty, and conceded that the prosecution could have a legitimate concern whether this prospective juror would actually impose it in a case. [*Id.* at 6358.]

The prosecutor offered credible reasons for challenging the jurors in question, and the trial court concluded that those reasons were sufficient and race-neutral. The California Supreme Court found no evidence of a due process violation under *Powers v. Ohio*, based its findings on the record before it, and properly applied controlling federal law.

This Court cannot say the state court's denial of this claim was contrary to or an unreasonable application of clearly established federal law, nor was it based upon an unreasonable determination of the facts. *Williams*, 529 U.S. at 412-13. As a result, this claim does not entitle Petitioner to habeas relief.

3. Claim 5 — Loss of juror questionnaires

Petitioner alleges that the loss of the majority of the juror questionnaires in his case resulted in a violation of his rights to meaningful appellate review, to a reliable penalty determination, and to due process. (Pet. at 24.) Respondent argues that the California Supreme Court considered this claim and rejected it on the merits, and further asserts that the claim is "procedurally barred." (Ans. at 30.) Respondent initially argued that "Petitioner has not shown that the claim does not rest upon a new rule

barred under *Teague* v. Lane." (*Id.*)

A. Procedural arguments

Respondent's *Teague* claim was discussed and rejected above on page 8. Respondent also asserts Petitioner's claim 5 is "procedurally barred," because the state supreme court ruled it would not have engaged in comparative juror analysis between seated and non-seated jurors, and thus, Petitioner could not have suffered prejudice from the loss of the questionnaires. (Ans. at 29-30.)

This Court may decline to render an opinion on the adequacy of procedural default rules and decide this claim on the merits. Established precedent in the Ninth Circuit dictates that a court's decision with respect to evaluating procedural default is to be informed by furthering "the interests of comity, federalism, and judicial efficiency." *Boyd v. Thompson*, 147 F.3d 1124, 1127 (9th Cir. 1998). Thus, if deciding the merits of a claim proves to be less complicated and less time-consuming than adjudicating the issue of procedural default, a court may exercise discretion to take this course of action in its management of the case. *Batchelor v. Cupp*, 693 F.2d 859, 864 (9th Cir. 1982), quoted by *Boyd*, 147 F.3d at 1127. This is the case here.

B. California Supreme Court's opinion

The state supreme court denied this claim on direct appeal, concluding:

> Defendant claims that his constitutional right to a meaningful review of his conviction and sentence has been infringed by the loss of the bulk of prospective juror questionnaires. The

questionnaires of the seated jurors and alternates were preserved, but almost all others have been lost.

As a general matter, we disagree. We addressed, and rejected, a similar claim in *People v. Alvarez, supra,* 14 Cal. 4th 155, where we said: "[D]efendant maintains that his *Wheeler*[-]*Batson* claim must be resolved in his favor on the ground that the record on appeal is not adequate to permit meaningful review. The deficiency of which he complains is the absence of certain questionnaires, which were completed by prospective jurors, then lodged with the superior court, subsequently lost by its clerk's office, and finally determined by the superior court to be beyond reconstruction. A criminal defendant is indeed entitled to a record on appeal that is adequate to permit meaningful review. That is true under California law. [Citation.] It is true as well under the United States Constitution—under the Fourteenth Amendment generally, and under the Eighth Amendment specifically when a sentence of death is involved. [Citation.] The record on appeal is inadequate, however, only if the complained-of deficiency is prejudicial to the defendant's ability to prosecute his appeal." (*Id.* at p.196, fn.8.)

With regard to the prospective jurors whose questionnaires were lost but who are not identified by the defendant as the subject of the *Wheeler* challenges: this

> court will not in any event compare the views of those jurors excused by peremptory challenges with those who were not excused on that basis. (*People v. Jackson* (1996) 13 Cal. 4th 1164, 1197 [56 Cal. Rptr. 2d 49, 920 P.2d 1254]; cf. *id* at pp. 1249 (conc. opn. of Mosk, J.) [urging a contrary approach].) Under this court's precedent, therefore, the loss of the questionnaires could not have prejudiced him. With regard to the prospective jurors whose questionnaires were lost and who were the subject of *Wheeler* challenges, we have already explained that the record is sufficiently complete for us to be able to conclude that they were not challenged and excused on the basis of forbidden group bias. Thus, even if there was federal error, it was harmless beyond a reasonable doubt (*Chapman v. California, supra,* 386 U.S. 18, 24, [87 S.Ct. 824, 828]), and under state law any error also was harmless (*People v. Watson, supra,* 46 Cal.2d 818, 836).

Ayala, 24 Cal. 4th at 269-70.

Petitioner points out that Chief Justice George dissented from the California Supreme Court's conclusions in *Ayala*, finding the harmless error analysis used by the majority to examine Petitioner's claims to be "suspect." *Id.* at 295. Chief Justice George further opined that the court's exclusion of defense counsel and the defendant from the hearings where the prosecutor disclosed his reasons for the peremptory challenges, coupled with the loss of the juror questionnaires, warranted relief. In the dissent,

he wrote:

> Further, a remand also would be impracticable and inadequate in this case because the extensive written juror questionnaires of the vast majority of panelists who participated in the general voir dire have been lost and apparently destroyed. Thus, as a result of the trial court's error, we are left with a record that is inadequate for our review and that cannot be reconstructed at this time. Accordingly, a reversal of the conviction and a remand for a new trial is the only appropriate remedy.

Id. at 297.

C. Discussion

Due process requires that the record of proceedings must be sufficient to permit adequate and effective appellate review. *Griffin v. Illinois*, 351 U.S. 12, 20 (1956). A criminal defendant has the right to a record on appeal which includes a complete transcript of the proceedings at trial. *Hardy v. United States*, 375 U.S. 277, 279-82 (1964). Where part of the record is missing, a petitioner must demonstrate prejudice to his or her appeal before relief may be granted. *United States v. Carrillo*, 902 F.2d 1405, 1410 (9th Cir. 1990). Petitioner maintains that the loss of the juror questionnaires violated his right to a meaningful appellate review consisting of "comparing the responses on the questionnaires of the challenged minority prospective jurors with the responses to those same questions by non minority prospective jurors who were not the subject of peremptory challenges by the prosecution." (Pet. MSA at 17.)

Petitioner relies on the Ninth Circuit holdings in *United States v. Alcantar*, 832 F.2d 1175 (9th Cir. 1987), and the Ninth Circuit's review of that case on appeal of the remand, *United States v. Alcantar*, 897 F.2d 436 (9th Cir. 1990), to meld the arguments from Claims 1 and 2 with the argument in Claim 5. In *Alcantar*, a federal district judge held an *ex parte* hearing to hear the prosecution's reasons for their peremptory challenges, and the Ninth Circuit remanded the matter for the district court to conduct a new hearing, concluding that defense counsel should have been afforded an opportunity to argue that the reasons given by the prosecution for challenging the minority jurors were merely pretextual. *Alcantar*, 832 F.2d at 1180. On remand, the district court found no improper use of peremptory challenges and reaffirmed the conviction. *Alcantar*, 897 F.2d at 438. The Ninth Circuit again reversed, ordering a new trial, finding the "passage of time has rendered such a hearing meaningless," and had not served the purposes of allowing the defense an opportunity to challenge the prosecution's reasons and to "preserve a full record on appeal." *Alcantar*, 832 F.2d at 1180; *Alcantar*, 897 F.2d at 438. Petitioner asserts that the same interests were thwarted in this case, as the loss of the jury questionnaires deprived Petitioner of a full record on appeal which would have allowed him to conduct a comparative juror analysis.

California courts do not entertain comparative juror analysis for the first time on appeal. *People v. Montiel*, 5 Cal. 4th 877, 909 (1993) ("an appellate court will not reassess good faith by conducting its own comparative juror analysis.") Federal courts do consider comparative juror analysis a useful tool for analyzing peremptory strikes under federal law, and

the Ninth Circuit strongly suggested that the California courts "should" use this tool on appeal. *Boyd*, 455 F.3d at 906; *see also Turner v. Marshall*, 121 F.3d 1248, 1251-52 (9th Cir. 1997). The Ninth Circuit believes that "Supreme Court precedent requires a comparative juror analysis even when the trial court has concluded that the defendant failed to make a prima facie case." *Boyd*, 455 F.3d at 907. In this case, the trial court did find that defendant had made a prima facie case, heard the reasons of the prosecutor for challenging the prospective jurors, and concluded that the challenges were not made on an impermissible basis. In addition, in *Boyd*, the Ninth Circuit based its reasoning on the fact that the reviewing courts denied the petitioner access to a full voir dire transcript. *Id.* at 900. The circumstances between *Boyd* and the instant case are distinguishable, as this Petitioner has access to the full voir dire transcript and questionnaires from all seated jurors and alternates from his trial.

In the recently decided *Kesser v. Cambra*, ___ F.3d ___, 2006 WL 2589425 (9th Cir. Sept. 11, 2006) (en banc), the Ninth Circuit held that a state prosecutor improperly struck a prospective juror on the basis of race, reversing an earlier decision denying habeas relief. The Court's majority concluded that while the prosecutor's motive for the peremptory challenge was plausible when considered out of context, once it was considered in comparison with "the background and responses of the jurors who were seated, reveal[ed] the prosecutor's purposeful and plainly racial motives in excusing" the contested prospective jurors. *Kesser*, 2006 at *9. The Ninth Circuit concluded that the state court, in refusing to consider comparative evidence in the record before them, made an unreasonable determination of facts in violation of 28

U.S.C. § 2254(d)(2), which warranted reversal of the judgment and a grant of the writ. *Id.* at *6.

Respondent accurately points out that Claim 5 is not a direct *Batson* claim, but "involves the sufficiency of the record" after a number of juror questionnaires were lost or destroyed. (Resp. SB at 4.) The questionnaires of the seated jurors and alternate jurors were preserved, and the state court's ruling was limited to the impact of the lost questionnaires of challenged and otherwise non-selected jurors. As such, the nature of Petitioner's comparative analysis claim is strikingly different than the one advocated by the Ninth Circuit in *Kesser*. Petitioner alleges prejudice from the loss of the questionnaires of non-serving jurors in his case, as he is unable to make comparisons between the written answers provided in those materials with the prosecutor's stated reasons for striking certain minority jurors from the panel.

However, comparative analysis is intended to draw parallels between challenged jurors and those allowed to serve. Petitioner has access to those materials in the record, in the form of the voir dire transcript, the prosecution's stated reasons for challenging certain jurors, and the questionnaires of the empaneled jurors and alternates. Comparing the questionnaire answers of non-challenged and non-seated jurors with the jurors who were the subject of the prosecution's peremptory challenges would serve little purpose. The California Supreme Court held that they "will not in any event compare the views of those jurors excused by peremptory challenges with those who were not excused on that basis" and concluded that the loss of the contested questionnaires did not result in prejudice to

Petitioner. *Ayala*, 24 Cal. 4th at 270.

Here, the record on appeal provides a meaningful and effective presentation of Petitioner's claims, and appears sufficient to resolve the contentions presented in his federal habeas petition. The reporter's transcript of jury selection proceedings, available to Petitioner, is 6461 pages in 51 volumes and thoroughly recounts the voir dire. Objections to peremptory challenges, challenges for cause and motions regarding prospective jurors are all contained in the available record. The trial judge and counsel specifically questioned potential jurors regarding their responses in the questionnaires, thoroughly exploring their ability to serve as a juror in Petitioner's trial. In addition, the questionnaires of the seated jurors and alternates were preserved for review on appeal. The record in this case does allow a reviewing court to examine whether the prosecution exercised its peremptory challenges in an appropriate manner.

It is true that, due to the loss of certain questionnaires, comparisons between challenged juror's answers and non-challenged and non-seated juror's responses cannot be made. However, the California Supreme Court concluded that the record on appeal was sufficiently complete to conclude that the challenged jurors were not excused due to any constitutionally forbidden reasons. *Ayala*, 24 Cal. 4th at 269-70. The state supreme court found that if there was an error in the jury selection proceedings, it was harmless. *Id.*

It is not mandatory for a state court to engage in comparative analysis of challenged jurors to non-challenged and non-seated jurors, and the failure to do so is not an unreasonable application of, or

contrary to, clearly established federal law under 28 U.S.C. § 2254(d)(1). As a result, Petitioner is unable to demonstrate that the loss of those jury questionnaires violated his rights to meaningful appellate review, to a reliable penalty determination, or to due process, and is not entitled to habeas relief.

4. Claim 9 — Prospective Juror Linda J.

Petitioner alleges that "the trial court excluded prospective juror Linda J. [sic] for cause on the ground that her views on the death penalty would substantially impair her ability to perform her duties as a juror," which violated Petitioner's rights to a fair and impartial jury and to due process. (Pet. at 33.) Respondent argues that the California Supreme Court considered this claim on direct appeal and rejected it on the merits. (Ans. at 41.)

A. California Supreme Court's opinion

The state supreme court did consider this claim on direct appeal, concluding:

> Defendant claims that the Sixth and Fourteenth Amendments to the United States Constitution were violated when the trial court granted the prosecution's motion to excuse a prospective juror for substantially impaired ability to follow the law regarding capital punishment. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 852, 83 L.Ed.2d 841].)
>
> "As we [have] explained..., '[w]hen a prospective juror's views about the death penalty "would 'prevent or substantially impair the performance of his [or her] duties as a juror'" [citation], the juror is

not impartial and may be challenged "for cause"'" (*People v. Earp* (1999) 20 Cal. 4th 826, 853 [85 Cal. Rptr. 2d 857, 978 P.2d 15].) This test applies equally to defense and prosecution challenges. (*Ibid.*) As stated, "'if the juror's statements are equivocal or conflicting, the trial court's determination of the juror's state of mind is binding. If there is no inconsistency, we will uphold the court's ruling if it is supported by substantial evidence. [Citations.]' [Citation.] A juror's bias need not 'be proven with unmistakable clarity. [Citations.] Rather, it is sufficient that the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law in the case before the juror.'" (*People v. Carpenter, supra,* 21 Cal. 4th 1016, 1035.)

Linda J's answers were inconsistent. Initially she testified that she would "find it difficult" to return a verdict of death. She stated that she went beyond being unsure about imposing the death penalty; rather, "I don't think I'm capable of that." But she also testified that she favored the death penalty in the abstract, and she hypothesized that the trial might enable her to summon the will to impose it.

After initially denying the prosecution's challenge for cause on the grounds that Linda J. was "impaired, but not substantially," the trial court later reversed itself, finding that her ability to

> serve as a juror was substantially impaired.
>
> Because Linda J.'s answers were inconsistent, but included testimony that she did not think herself capable of imposing the death penalty, we are bound by the trial court's determination that her candid self-assessment showed a substantially impaired ability to carry out her duty as a juror. There was no violation of any constitutional right.

Ayala, 24 Cal. 4th at 274-75.

B. Discussion

The United States Supreme Court has held that a sentence of death cannot be upheld if the jury that imposed or recommended it excluded prospective venirepersons who expressed opinions against the death penalty. *Witherspoon v. Illinois*, 391 U.S. 510, 522-23 (1968). In 1980, the Supreme Court further held that "a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Adams v. Texas*, 448 U.S. 38, 45 (1980). The Court later affirmed that the *Adams* standard was the proper standard by which to evaluate allegations of improper exclusion of prospective jurors. *Wainwright v. Witt*, 469 U.S. 412, 423 (1985).

Appellate review of a trial court's decision regarding issues arising from juror voir dire is obligatorily deferential, as a "reviewing court, which analyzes only the transcripts from voir dire, is not as well-positioned as the trial court to make credibility

determinations." *Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003). In the instant case, the trial court initially denied the state's challenge for cause and later reversed its own decision, ultimately striking Linda J. for cause based on her views regarding capital punishment. This reversal, on its own, does not allow this court to conclude that the trial court erred. Rather, Petitioner must demonstrate that the state supreme court made an unreasonable determination of facts or applied the law in an unreasonable manner in rejecting this claim on appeal.

Upon initial questioning by the trial court, Linda J. said that she would "find it difficult" to vote for the death penalty. [43 RT 4969.] During questioning by defense counsel, she maintained that she would have no difficulty deciding the guilt or innocence of the defendant [*Id.* at 4970], but "to say whether a person is going to die, I don't think I'm capable of that." [*Id.* at 4975.] She conceded that it was "possible" that she could vote for the death penalty if she was placed on the jury, if she was "totally convinced" that it was the right decision. [*Id.* at 4976, 4979.]

When the prosecutor began inquiring into her views on capital punishment, she stated that "When I just think about it, without listening to— having to go through the steps getting to it, I would have to say I couldn't do it." [*Id.* at 4991.] She expanded on this, explaining that if she took it "step by step, probably I could listen and come up with a choice," but that when she considered the death penalty issue as a whole, she did not think she could impose it. [*Id.* at 4991-92.] Linda J. repeated her discomfort with the death penalty throughout her juror interview, and only expressed the hope that she could "possibly"

develop an ability to impose the death penalty after sitting through the trial as a juror. [*Id.* at 4994-95.]

The trial court initially rejected the prosecutor's challenge for cause, stating that "I think Linda J. [sic] is impaired, but not substantially." [*Id.* at 4998.] The court opined that, regarding a decision on the death penalty, that "she [Linda J.] probably can do it." [*Id.* at 4999.] The trial court later reconsidered the state's motion in support of a challenge for cause of Linda J. on the basis of briefs submitted by both the prosecutor and defense counsel. [48 RT 5748.] Both parties declined further oral argument on the subject, and the trial court ultimately decided that Linda J. was in fact "substantially impaired" on the penalty issue and granted the challenge for cause. [*Id.* at 5784-85.]

The Supreme Court has stated that in conducting juror interviews,

> [M]any veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. For reasons that will be developed more fully *infra*, this is why deference must be paid to the trial judge who sees and hears the juror.

Witt, 469 U.S. at 425-26, footnote omitted.

The Supreme Court has opined that a trial judge's "power of observation often proves the most accurate means of ascertaining the truth." *Witt*, 469 U.S. at 434. Contrary to Petitioner's assertions, the Court finds substantial support for the conclusions reached by both the trial court and the state supreme court in determining that Linda J. was "substantially impaired" in her ability to perform as juror due to her views on the death penalty. *Witt*, 469 U.S. at 433.

The California Supreme Court's determination that the trial judge did not commit error in excusing Linda J. was not contrary to or an unreasonable application of federal law, nor was it based on an unreasonable determination of the facts. *Williams*, 529 U.S. at 412-13. Petitioner is not entitled to habeas relief on this claim.

EVIDENTIARY HEARING STANDARD

In his Reply, Petitioner argues that if the Court does not grant his Motion for Summary Adjudication, then in the alternative an evidentiary hearing should be granted. (Pet. Reply at 8.) Respondent notes that, in Petitioner's Group Two Motion for Summary Adjudication, Petitioner himself asserted that there were no genuine issues of material fact, and he was thus entitled to summary adjudication on the Group Two claims. (*Id.*, citing Pet. MSA at 1.) Respondent maintains that the instant case is therefore controlled by 28 U.S.C. § 2254(d)(2), not 28 U.S.C. § 2254(e). At oral arguments on the Group Two claims, Petitioner explained to the Court that he exercised an abundance of caution in requesting an evidentiary hearing but did not himself believe that any further facts could be discovered on the Group

Two claims.

Generally, the standard for granting an evidentiary hearing requires Petitioner to make a showing he is entitled to habeas relief.

> A habeas petitioner is entitled to an evidentiary hearing as a matter of right on a claim where the facts are disputed if two conditions are met: (1) where the petitioner's allegations would, if proved, entitled him to relief; and (2) the state court trier of fact has not, after a full and fair hearing, reliably found the relevant facts.

Rich v. Calderon, 187 F.3d 1064, 1067-68 (9th Cir. 1999); *Correll v. Stewart*, 137 F.3d 1404, 1411 (9th Cir. 1998). The first prong is typically referred to as the requirement of asserting a "colorable claim." *Siripongs v. Calderon*, 35 F.3d 1308, 1310 (9th Cir. 1994). To properly assert a "colorable claim," a petitioner is "required to allege specific facts which, if true, would entitle him to relief." *Ortiz v. Stewart*, 149 F.3d 923, 934 (9th Cir. 1998).

A petitioner is entitled to an evidentiary hearing if the second prong is met through a showing that:

> (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court

> hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair hearing.

Townsend v. Sain, 372 U.S. 293, 312 (1963), overruled in part, *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). When a petitioner is able to establish a colorable claim for relief, did not fail to develop the facts surrounding his claim, and was never given a state hearing on the claim, the district court must conduct an evidentiary hearing. *Insyxiengmay v. Morgan*, 403 F.3d 657, 670 (9th Cir. 2005), quoting *Baja v. Ducharme*, 187 F.3d 1075, 1078 (9th Cir. 1999).

In addition to being entitled an evidentiary hearing as of right when the petitioner presents colorable allegations and the state court has not reliably found the relevant facts through no fault of the petitioner, a federal court retains discretionary authority to conduct an evidentiary hearing. *Id.* at 318; *Seidel v. Merkle*, 146 F.3d 750, 753 (9th Cir. 1998).

The AEDPA further limits a district court's decision to conduct evidentiary hearings in § 2254 proceedings. *See* 28 U.S.C. § 2254 (e)(2); *see Ortiz-Sandoval v. Clarke*, 323 F.3d 1165, 1171 n.4 (9th Cir. 2003). Section 2254(e) provides as follows:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing unless the applicant shows that:
>
> (A) the claim relies on:

> (I) a new rule of constitutional law, made retroactive to cases on collateral review by th Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C.A. § 2254(e) (West. Supp. 2005).

As stated above, the standard for granting an evidentiary hearing requires Petitioner to make a showing he is entitled to relief if the facts alleged can be proven. Petitioner has failed to do so. Petitioner has not shown that any of these claims rely on either a new rule of constitutional law or a factual predicate that could not have been previously discovered through due diligence. *See* 28 U.S.C. § 2254(e)(2).

Accordingly, Petitioner is not entitled to an evidentiary hearing.

IT IS SO ORDERED.

DATED: October 23, 2006

IRMA E. GONZALEZ, Chief Judge

United States District Court

Filed February 25, 2014

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HECTOR JUAN AYALA, Petitioner-Appellant,

v.

ROBERT K. WONG, Warden, Respondent-Appellee.

No. 09-99005

ORDER

The opinion and dissenting opinion, filed on September 13, 2013, and published at 730 F.3d 831, are replaced by the amended opinion and amended dissenting opinion filed concurrently with this Order.

Judges Reinhardt and Wardlaw voted to deny the petition for rehearing en banc. Judge Callahan voted to grant the petition. A judge requested a vote on whether to rehear this matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35. The request for rehearing en banc is **DENIED**. No further petitions will be entertained.

Judge Ikuta's dissent from denial of rehearing en banc is filed concurrently with this Order.

DISSENT

IKUTA, Circuit Judge, joined by O'SCANNLAIN, TALLMAN, BYBEE, CALLAHAN, BEA, M. SMITH, and N.R. SMITH, Circuit Judges, dissenting from the denial of rehearing en banc:

The Supreme Court has twice before rejected the approach to habeas review that the panel majority adopts here. In two prior habeas opinions, *Richter v.*

Hickman, 578 F.3d 944 (9th Cir. 2009) (en banc), and *Williams v. Cavazos*, 646 F.3d 626 (9th Cir. 2011), we brushed aside the deference we owe a state court's adjudication of a petitioner's claim under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254(d), and reviewed a petitioner's claim de novo. The Supreme Court unanimously reversed both of these opinions. It held that we must defer to a state court denial of a federal claim even if the state court issued only a summary denial, *Harrington v. Richter*, 131 S. Ct. 770, 784-85, 178 L. Ed. 2d 624 (2011), and even if the state court issued a reasoned opinion that did not expressly reject the federal claim, *Johnson v. Williams*, 133 S. Ct. 1088, 1094-96 (2013).

Undeterred, the panel majority now tries yet another route to de novo review. It reasons that the Supreme Court has not yet *directly* told us that we must defer to a state court decision holding that any potential federal constitutional error was harmless. Therefore, the panel majority concludes, we can review such a claim de novo, free of AEDPA deference. In reaching this conclusion, the panel majority ignores the clear command of AEDPA and the Supreme Court, and creates a circuit split. Because we should interpret AEDPA in accordance with the statutory language and the direction provided by the Supreme Court, I respectfully dissent from the court's failure to rehear this case en banc.

I

The length and complexity of the panel majority's opinion cannot disguise the fact that it circumvents the Supreme Court's ruling in *Richter* and *Williams* that "a federal habeas court must presume that the federal claim was adjudicated on the merits."

Williams, 133 S. Ct. at 1096. Here, Juan Ayala presented his claim—that the Constitution required defense counsel to be present when the prosecutor presented his reasons for striking certain jurors—to the California Supreme Court, and the court rejected that claim. Twice.

The facts underlying Ayala's claim are straightforward. Ayala was charged with multiple murders. During jury selection, he argued that the prosecutor was striking jury panelists on the basis of their race or ethnicity in violation of *People v. Wheeler*, 22 Cal. 3d 258 (1978),[1] and its federal analogue, *Batson v. Kentucky*, 476 U.S. 79 (1986). *See People v. Ayala (Ayala I)*, 24 Cal. 4th 243, 259-60 (2000). The trial court asked the prosecutor to explain his reasons for those challenges, but the prosecutor expressed concern about doing so in open court for fear of revealing his trial strategy. *Id.* at 260. To alleviate this concern, the trial court held three ex parte hearings to consider the prosecutor's reasons for his challenges, and each time found that the prosecutor was not challenging jury panelists because of race or ethnicity. *Id.*

On direct appeal to the California Supreme Court,

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[1] *Wheeler* presaged *Batson* by interpreting the California Constitution to prohibit race-based peremptory challenges. *See Wade v. Terhune*, 202 F.3d 1190, 1192 (9th Cir. 2000). The California Supreme Court has stated that "[s]ubstantially the same principles apply under *Batson*" as under *Wheeler*. *People v. Alvarez*, 14 Cal. 4th 155, 193 (1996). Although there are some differences between the *Wheeler* and *Batson* standards, *see Wade*, 202 F.3d at 1196-97, those differences are not applicable here. Accordingly, "because we are reviewing [Ayala's] petition for a writ of habeas corpus under 28 U.S.C. § 2254, we generally refer to *Batson* in analyzing his claims." *Mitleider v. Hall*, 391 F.3d 1039, 1042 n.2 (9th Cir. 2004).

Ayala challenged his exclusion from the ex parte *Batson* hearings. The court addressed the issue at length. *See id.* at 259-69. It began by reciting the *Batson/Wheeler* procedure for determining whether a prosecutor's peremptory challenges were discriminatory. *Id.* at 260-61. First, the defendant must make a prima facie case that the prosecutor used his peremptory challenges to exclude "members of a cognizable group" because of their group association. *Id.* at 260. Second, the burden shifts to the prosecutor "to provide a race-neutral explanation for the exercise of peremptory challenges." *Id.* Third, the trial court must determine "whether those stated reasons are untrue and pretextual." *Id.* at 261.

After explaining the necessary steps in a court's adjudication of a *Batson/Wheeler* claim, the California Supreme Court held that, so long as "the inquiry proceeds within the general framework just articulated, no particular procedures are constitutionally required." *Id.* The court's conclusion rested on *Powers v. Ohio*, 499 U.S. 400 (1991), which stated, with respect to *Batson* hearings, that "'[i]t remains for the trial courts to develop rules, without unnecessary disruption of the jury selection process, to permit legitimate and well-founded objections to the use of peremptory challenges as a mask for race prejudice.'" *Ayala I*, 24 Cal. 4th at 261 (quoting *Powers*, 499 U.S. at 416). This conclusion resolved Ayala's federal constitutional claim that *Batson* required the trial court to include the defendant or defense counsel in the hearings on the prosecutor's reasons for striking jury panelists.

While rejecting Ayala's constitutional claim, the court went on to consider "whether it was error to exclude defendant from participating in the hearings

on his *Wheeler* motions" as a matter of California law. *Id.* at 262. Because "[t]he question whether ex parte communications are proper in ruling on a *Wheeler* motion ha[d] not arisen in California decisional law," the court surveyed the legal landscape, citing cases from the Fourth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits, as well as cases from New York, Maryland, and Texas that had considered analogous procedural issues. *Id.* It noted that "[w]hile some decisions have tolerated an ex parte Batson hearing procedure on the ground that the United States Constitution permits it," *id.* (citing *United States v. Tucker*, 836 F.2d 334, 340 (7th Cir. 1988), and *United States v. Davis*, 809 F.2d 1194, 1202 (6th Cir. 1987)), most courts to have considered the issue determined that ex parte proceedings were "poor procedure and should not be conducted unless compelling reasons justify them," *id.* at 262-63. Aligning itself with the majority, the court held that, as a matter of state procedure, trial courts should not hold ex parte *Batson/Wheeler* hearings, and therefore "that error occurred under state law" in Ayala's case. *Id.* at 263-64. Nevertheless, after a careful review of the record pertaining to the seven challenged jurors, including the transcripts of the exchanges between the prosecutor and the judge, the court concluded that the prosecutor's peremptory challenges did not exclude a cognizable group from the jury on a discriminatory basis. *Id.* at 264-68. Consequently, although the trial court erred in light of the newly adopted state procedure, "the error was harmless." *Id.* at 268. And any potential federal error "was harmless beyond a reasonable doubt," according to the California Supreme Court. *Id.* at 269 (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)).

In short, the California Supreme Court considered Ayala's *Batson* claim, rejected it on the merits, and followed that up by holding that any potential error was harmless. Given that *Richter*, 131 S. Ct. at 784-85, and *Williams*, 133 S. Ct. at 1094-96, require us to presume that the state court adjudicated a claim on the merits when the claim was presented to the state court and the state court denied relief, there is no doubt the court adjudicated Ayala's claim on the merits here. Therefore, the only question is whether the state court's adjudication of Ayala's *Batson* claim was an unreasonable application of Supreme Court precedent.

As the California Supreme Court pointed out, "no particular procedures are constitutionally required." *Ayala I*, 24 Cal. 4th at 261. *Batson* itself "decline[d] ... to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges," 476 U.S. at 99, and the Supreme Court has left it to the lower courts to "develop [the] rules," *Powers*, 499 U.S. at 416. No subsequent Supreme Court case has given further instruction on *Batson* procedures, and certainly no Supreme Court case has foreclosed the use of ex parte proceedings. Therefore, the California Supreme Court's rejection of Ayala's *Batson* claim in this case was not contrary to, or an unreasonable application of, clearly established Supreme Court caselaw, and we should have affirmed the district court.

II

Contrary to Supreme Court precedent, the plain language of AEDPA, and the decisions of our sister circuits, the panel majority here reasons that no AEDPA deference is owed to the state court's opinion. Am. Maj. Op. at 21, 27-28. Notwithstanding the

presumption established by *Richter* and *Williams*, the panel majority concludes that the state court did not adjudicate Ayala's claim on the merits because the state court never analyzed the merits of Ayala's *Batson* claim and held only that any federal error would have been harmless. As a threshold matter, this misreads the state court's opinion. The California Supreme Court addressed and rejected Ayala's *Batson* claim on the ground that no particular procedures are constitutionally required, and only later reinforced its rejection of the *Batson* claim by holding that any potential error was harmless. But even if the state court had limited itself to holding that any federal error was harmless, the panel majority's analysis of whether the state court adjudicated Ayala's claim on the merits is wrong.

Williams held that we must presume that a state court adjudicated a federal claim on the merits, and that this presumption is rebutted only "[w]hen the evidence leads very clearly to the conclusion that a federal claim was inadvertently overlooked in state court." 133 S. Ct. at 1097.[2] Here, "the evidence leads

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[2] As *Williams* demonstrated, this presumption is quite robust. In *Williams*, the California Court of Appeal had rejected a petitioner's claim regarding the dismissal of a juror, citing only a California Supreme Court opinion, *People v. Cleveland*, 25 Cal. 4th 466 (2001), and other principles of state law. *People v. Taylor*, No. B137365, 2002 WL 66140, at *8 (Cal. Ct. App. Jan. 18, 2002). *Cleveland*, in turn, had discussed but rejected two federal circuit court opinions that themselves addressed the Sixth Amendment. 25 Cal. 4th at 480-84. *Williams* concluded that the state court's mere mention of *Cleveland* was enough to show that the state court understood it was resolving a question of federal constitutional law. 133 S. Ct. at 1098-99. Accordingly, *Williams* held that the state court had adjudicated the

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very clearly to the conclusion" that the California Supreme Court did not inadvertently overlook Ayala's *Batson* claim: it discussed the claim, found no error, ruled that any potential error would be harmless, and denied relief overall. Under *Williams*, therefore, we must presume that the state court adjudicated Ayala's claim on the merits, and the only question left is whether that adjudication was an unreasonable application of Supreme Court precedent. *See* 28 U.S.C. § 2254(d).

The panel majority attempts to evade this conclusion by insisting that the rebuttable presumption discussed in *Richter* and *Williams* is rebutted in this case by the "principle of constitutional avoidance." Am. Maj. Op. at 35-36, 39. The panel majority reasons that "the California Supreme Court had no reason to reach Ayala's federal constitutional claim" because it could resolve the claim as a matter of state law, and "under long established legal principles, the California Supreme Court had every reason not to decide unnecessarily a question of federal constitutional law." *Id.* at 39-40. Because there was no compelling reason for the California Supreme Court to have evaluated the claim of constitutional error, the panel majority concludes that the California Supreme Court did not

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(...continued)
petitioner's Sixth Amendment claim on the merits, and rejected the Ninth Circuit's conclusion to the contrary. *Id.* at 1099. Given the Supreme Court's determination that the state court adjudicated a petitioner's federal claim because it referenced an earlier state opinion that itself mentioned federal circuit court opinions, the California Supreme Court's direct discussion and rejection of Ayala's *Batson* claim in this case was a clear adjudication of that claim on the merits.

adjudicate Ayala's *Batson* claim on the merits. *Id.* at 39-41.[3] It is obvious that this conclusion directly reverses the presumption in *Williams*. Where *Williams* would hold that we presume a state court reached the federal issue, the panel majority holds that we presume the state court did everything in its power to *avoid* reaching that federal issue.

The panel majority supports its reverse presumption by reference to Supreme Court cases granting relief to habeas petitioners raising ineffective assistance of counsel claims. *Id.* at 37-38 (citing *Porter v. McCollum*, 558 U.S. 30 (2009); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003)). But these cases offer no support for the panel majority's novel theory. In

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[3] A confusing aspect of the panel majority's opinion is its observation that "*if* we were required to determine whether the California Supreme Court adjudicated Ayala's claim of federal constitutional error on its merits in favor of the petitioner or the state, we *would* hold without question that the California Supreme Court found error in petitioner's favor under both state law and federal constitutional law." Am. Maj. Op. at 34 (emphases altered). The panel majority refers to this scenario as "Option 1." *Id.* at 30. "Option 1" would present a very different case: Had the California Supreme Court held that the trial court committed a *Batson* error, and had Ayala challenged only the court's determination under *Chapman* that such error was harmless, we would have to decide the open question of how AEDPA would apply to that type of adjudication on the merits. But the panel majority does not resolve this question, and instead makes the fatal error of holding that the California Supreme Court did not adjudicate Ayala's federal claim on the merits, whether in favor of Ayala, *see id.* at 28 n.3, 31 n.4, or against him. Thus, while the panel majority discusses the "Option 1" scenario at great length, it elects instead to presume (contrary to *Richter* and *Williams*) that the state court avoided an "Option 1" scenario by deciding Ayala's claims on state law grounds.

those cases, a state court rejected a petitioner's ineffective assistance claim on either the deficiency or prejudice prong, and did not reach the other prong. Applying § 2254(d), the Supreme Court concluded in each case that the state court's adjudication of one of the *Strickland* prongs was contrary to, or an unreasonable application of, *Strickland*. Because the state court did not reach the other prong, the Supreme Court addressed it de novo. *Porter*, 558 U.S. at 39; *Rompilla*, 545 U.S. at 390; *Wiggins*, 539 U.S. at 534. These cases are consistent with *Williams*, because the state court's express refusal to reach one of the *Strickland* prongs rebuts the presumption that the state court adjudicated that prong on the merits. Moreover, because the Supreme Court determined that the state court's analysis of one prong was an unreasonable application of *Strickland*, it was freed from AEDPA deference, and could review the other prong of the *Strickland* claim de novo. *Porter*, 558 U.S. at 39; *Rompilla*, 545 U.S. at 390; *Wiggins*, 539 U.S. at 534.[4]

Moreover, the Supreme Court has never suggested that when a state court rejects a petitioner's claim because any potential error was harmless, we can review the claim de novo because that claim was not fully adjudicated on the merits. Such a conclusion contravenes *Richter* and *Williams*, which instruct us to presume that a state court has

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[4] Another case cited by the panel majority, *Cone v. Bell*, 556 U.S. 449 (2009), is equally inapplicable. Am. Maj. Op. at 38-39. In *Cone*, the Supreme Court held that when a state court erroneously finds a procedural default and therefore has not reached the merits of a claim, a federal court can do so. 556 U.S. at 469-72. No one suggests that Ayala procedurally defaulted his *Batson* claim.

adjudicated a claim on the merits and to apply AEDPA deference when a state court has denied relief overall, regardless of the grounds for denying relief. The panel majority's interpretation also contradicts the commonsense interpretation of "adjudicated on merits." We have held that the term "adjudicated on the merits" as used in § 2254(d) means that "the petition ... was either granted or denied, [and] ... that the grant or denial rest[s] on substantive, rather than procedural, grounds." *Lambert v. Blodgett*, 393 F.3d 943, 966 (9th Cir. 2004); *see also Barker v. Fleming*, 423 F.3d 1085, 1092 (9th Cir. 2005). A determination that any error was harmless is a denial of relief on "substantive ... grounds." Accordingly, a decision that any error was harmless is an adjudication on the merits, and we should apply § 2254(d) to that adjudication. The majority's failure to do so is contrary to the command of § 2254(d) and our precedents interpreting it.

Not only does the panel majority's approach contradict AEDPA and our precedent, it also conflicts with the conclusion reached by our sister circuits. As the Tenth Circuit recently explained, "[w]here a state court assumes a constitutional violation in order to address whether the defendant was actually harmed by the violation, as here, the state court takes the claim on the merits; it just disposes of it on alternative *merits*-based reasoning." *Littlejohn v. Trammell*, 704 F.3d 817, 850 n.17 (10th Cir. 2013). The Tenth Circuit concluded that because the state court rejected petitioner's constitutional claim on the ground that any error was harmless, it "render[ed] a decision that is on the merits for purposes of AEDPA." *Id.* at 850 n.17. Accordingly, the Tenth Circuit proceeded to consider whether the adjudication of the constitutional claim was an

unreasonable application of Supreme Court precedent. *Id.* The Seventh and Eighth Circuits have adopted a similar interpretation of "adjudicated on the merits." *See Anderson v. Cowan*, 227 F.3d 893, 898 (7th Cir. 2000) (considering a state court's rejection of a *Bruton* error on the ground that any such error was harmless beyond a reasonable doubt, and concluding that this rejection of the *Bruton* claim was not contrary to, or an unreasonable application of, clearly established Supreme Court precedent); *Whitmore v. Kemna*, 213 F.3d 431, 433 (8th Cir. 2000) ("[W]here the state court [] has conducted a *Chapman* harmless error analysis, ... the claim has been 'adjudicated on the merits' in state court."). The panel majority's conclusion that claims rejected on harmless error grounds are not "adjudicated on the merits" thus conflicts with all other circuits to have considered the question.

This is not a case-specific error that will be confined to the facts of this opinion. The panel majority's approach sets the groundwork for authorizing federal courts to review a habeas petition de novo whenever a state appellate court rejects a petitioner's federal claim on harmlessness grounds, contrary to the Supreme Court's admonition to defer to the state court's decisions, and the general rule that § 2254(d) barely "stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings," *Richter*, 131 S. Ct. at 786. The consequences of the panel majority's approach will reverberate throughout this circuit. The state courts within our circuit routinely resolve claims of federal error on the basis that any potential error was harmless. *See, e.g., People v. Thomas*, 54 Cal. 4th 908, 936-37 (2012); *People v. Loy*, 52 Cal. 4th 46, 69-71 (2011); *Smith v. State*, 111 Nev. 499, 505-06

(1995); *State v. Walton*, 311 Or. 223, 229-31 (1991); *State v. Whelchel*, 115 Wash. 2d 708, 728-30 (1990); *Braham v. State*, 571 P.2d 631, 645-48 (Alaska 1977). Under the panel majority's rationale, we would give AEDPA deference to none of these determinations.

III

Not only does the panel majority commit serious errors in its AEDPA analysis, it lands yet another blow to our AEDPA jurisprudence by concluding that we review a state court's harmless error analysis under an exceptionally non-deferential standard. After erroneously concluding that the California Supreme Court did not adjudicate Ayala's *Batson* claim on the merits, Am. Maj. Op. at 39-40, and determining under de novo review that the state trial court committed a *Batson* error in holding an ex parte hearing with the prosecutor, *id.* at 42, the panel majority purports to apply the prejudice standard set forth in *Brecht v. Abrahamson*, 507 U.S. 619 (1993), to review the California Supreme Court's conclusion that any federal error was harmless, Am. Maj. Op. at 49-70.

But the panel majority's application of the *Brecht* prejudice standard contradicts the Supreme Court's direction in *Fry v. Pliler*, 551 U.S. 112 (2007). Under *Brecht*, a federal habeas court that determines there is constitutional error cannot grant relief unless the error "had substantial and injurious effect or influence in determining the jury's verdict." 507 U.S. at 638 (internal quotation marks omitted). Before *Pliler*, a federal court faced a conundrum in considering a state court's decision that a constitutional error was harmless beyond a reasonable doubt under *Chapman*. The federal habeas court had to determine whether to: (1) apply

§ 2254(d), and ask whether the state court's rejection of the petitioner's claim on harmlessness grounds was based on an unreasonable application of *Chapman*, (2) apply the general harmless error standard for habeas cases in *Brecht*, or (3) do both.

In *Pliler*, the Supreme Court sought to simplify the harmlessness assessment for federal courts and ensure that state courts received proper deference. It held that federal courts should apply the *Brecht* standard in every case because it is more deferential to state courts. 551 U.S. at 119-20. *Pliler* explained that before AEDPA, the Supreme Court applied the *Brecht* standard of review to consider habeas claims of state trial errors, because *Brecht* provided a "more forgiving standard of review" than *Chapman*. *Id.* at 116. The Court then rejected the argument that the passage of AEDPA replaced *Brecht* with a more petitioner-friendly standard: "Given our frequent recognition that AEDPA limited rather than expanded the availability of habeas relief, it is implausible that, without saying so, AEDPA replaced the *Brecht* standard of actual prejudice [] with the more liberal AEDPA/*Chapman* standard which requires only that the state court's harmless-beyond-a-reasonable-doubt determination be unreasonable." *Id.* at 119-20 (internal quotation marks and citations omitted). Thus, it made sense to use the stricter *Brecht* standard in all habeas cases.

Nevertheless, given *Pliler*'s determination that the *Brecht* standard is more deferential to state courts than an AEDPA/*Chapman* analysis, it logically follows that if the state court's determination that an error is harmless beyond a reasonable doubt is not an unreasonable application of *Chapman*, then there is no prejudice under *Brecht*.

See Pliler, 551 U.S. at 120 (*Brecht* "obviously subsumes" AEDPA/*Chapman* review). Anything else would be inconsistent with *Pliler*'s reasoning. It would also be contrary to § 2254(d), which provides that a federal court *cannot* grant the writ unless the state court's adjudication of a claim resulted in a decision that was contrary to, or an unreasonable application of, clearly established Supreme Court precedent. *See Cudjo v. Ayers*, 698 F.3d 752, 768 (9th Cir. 2012) (stating that "if the California Supreme Court had appropriately applied the Chapman analysis in analyzing this Constitutional error, this court would be required to defer to that analysis under AEDPA unless it was unreasonable").

Applying this reasoning here, the California Supreme Court's determination that the procedure adopted by the trial court in holding an ex parte hearing was harmless beyond a reasonable doubt was not an unreasonable application of *Chapman*. The California Supreme Court devoted several pages to a meticulous review of the trial court's decision regarding the seven jurors who were excluded and gave well-reasoned and supported explanations for why "the challenged jurors were excluded for proper, race-neutral reasons." *Ayala I*, 24 Cal. 4th at 264.

Because we would be compelled to defer to the state court under an AEDPA/*Chapman* framework, we necessarily should find no Brecht prejudice. *See Pliler*, 551 U.S. at 120. In contrast, the panel majority engages in not just de novo legal analysis, but de novo review of the record that piles speculation upon speculation instead of giving due deference to the finder of fact.[5] *See Batson*, 476 U.S.

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[5] One particularly striking example of the panel (continued...)

at 98 n.21. The panel majority's erroneous application of *Brecht* contradicts *Pliler* and dangerously muddles our caselaw.

IV

In sum, the panel majority's path to de novo review is contrary to the plain language of AEDPA, which precludes granting the writ unless the state court's adjudication of a claim "resulted in a decision that was contrary to, or involved an unreasonable

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(...continued)
majority's highly speculative approach is worth mentioning here. The panel majority offers the following hypothesis regarding how Ayala's input might have changed the trial court's conclusion that the prosecutor's reason for challenging one of the potential jurors was a legitimate nondiscriminatory reason (the panel majority discusses only three of the seven):

> An inference of racial bias might [] have been drawn from the prosecutor's claim that Gerardo O. was challenged because he did not dress or act like other jurors, and did not mix or socialize with them. It is likely that Gerardo O.'s dress and mannerisms were distinctly Hispanic. Perhaps in the late 1980s Hispanic males in San Diego County were more likely than members of other racial or ethnic groups in the area to wear a particular style or color of shirt, and Gerardo O. was wearing such a shirt (and for this reason did not 'fit in,' in the prosecutor's mind, with the other jurors). If so, and if defense counsel were able to bring this fact to the trial court's attention, the prosecution's explanation that it struck Gerardo O. because of his dress and mannerisms would provide compelling support for Ayala's claim that the strike was actually racially-motivated.

Am. Maj. Op. at 62. This sort of conjecture in the face of a contrary determination by the trier of fact has no place in analyzing prejudice.

application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). The panel majority hops over AEDPA's "bar on federal court relitigation of claims already rejected in state proceedings," *Richter*, 131 S. Ct. at 786, with a novel theory that ignores recent Supreme Court jurisprudence and conflicts with our sister circuits. In fact, the panel majority's opinion raises every red flag that should have prompted us to rehear a case en banc. The approach to AEDPA embodied in the panel majority's opinion has already struck out twice at the Supreme Court. I fear that with this case, we are looking at a hat trick. Because we should have corrected these errors ourselves, rather than asking the Supreme Court to weigh in a third time, I respectfully dissent from the denial of rehearing en banc.

Filed August 28, 2000

SUPREME COURT OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent,

v.

HECTOR JUAN AYALA, Defendant and Appellant.

No. S013188

OPINION

The San Diego County District Attorney filed an amended information on January 20, 1987, charging defendant with three murders and other offenses. The information alleged that the crimes all occurred on or about April 26, 1985.

Count 1 charged defendant with murder in the death of Jose Luis Rositas (Pen. Code, § 187; all unlabeled statutory references are to this code). Counts 2 and 3 contained the same charge in the deaths of Marcos Antonio Zamora and Ernesto Dominguez Mendez respectively. Count 4 charged him with the attempted murder of Pedro Castillo (§§ 187, 664), and count 5 with robbing him (§ 211). Count 6, which the superior court later dismissed and which the jury did not consider, charged him with robbing Zamora. Counts 7, 8, and 9 charged him with the attempted robbery of Dominguez, Rositas, and Zamora respectively (§§ 211, 664). The first six counts were accompanied by allegations that defendant personally used a firearm (§ 12022.5).

The amended information alleged that defendant committed the special circumstances of multiple murder (§ 190.2, subd. (a)(3)) and murder in the attempted commission of robberies (§ 190.2, former subd. (a)(17)(i), now subd. (a)(17)(A)).

The amended information further alleged that defendant had been convicted of other offenses: of robbery in 1972, of burglary in 1975, and of possessing controlled narcotic substances for sale in 1982.

The case was called for trial on January 17, 1989. William Woodward and Gloria Michaels represented the People, and Barton C. Sheela III and Glorene Franco represented defendant. (Woodward would later withdraw to join the bench. See *post*, at p. 287.) On August 1, 1989, the jury convicted defendant of all the offenses charged but one: the attempted robbery of Rositas. (None of the determinate terms is at issue here.) The jury also found, with respect to counts 1 through 5 and count 8 (the latter having been renumbered from count 9 following dismissal of count 6 as described in the previous paragraph), that defendant had personally used a firearm within the meaning of section 12022.5. It further found the special circumstance allegations true. Defendant waived his right to have the prior offense allegations tried before a jury, and the court found them true. The parties stipulated before the jury that he had suffered the convictions.

The penalty phase began August 14, 1989. On August 31, the jury returned a verdict of death on counts 1, 2, and 3, and the court entered judgment in accordance with it. The appeal to this court is automatic.

THE GUILT PHASE

FACTS

The prosecution theorized that defendant herein, Hector Juan Ayala, his brother Ronaldo Medrano Ayala, and Jose Moreno murdered Dominguez,

Rositas, and Zamora, after holding them captive in an automobile repair shop. (Moreno, tried under the name Joseph Juarez Moreno, was acquitted in a separate trial.) They would also have killed Castillo, but he improvised an escape plan and, though shot, survived to testify. Castillo provided the information that led to defendant's arrest and served as the prosecution's key witness at trial.

Opening statements and presentation of evidence began on May 30, 1989. San Diego Police Detective Richard Carey testified that on April 26, 1985, his homicide team was summoned to an automobile body repair shop located at 999 South Forty-third Street, between Logan and National Avenues in southeast San Diego. He found Dominguez's, Zamora's and Rositas's bodies in the shop office. All had been shot. A forensic pathologist, Dr. David Masamichi Katsuyama, testified that each had died from two gunshots to the head.

Prosecution Case

The prosecution theorized that the murders resulted from a robbery attempt that failed because it was based on the perpetrators' incorrect speculation that Dominguez had just returned from Mexico with a quantity of narcotics or cash.

Juan Manuel Meza testified that about a month before the killings Ronaldo Ayala, in the presence of Meza and defendant, proposed to rob the automobile body shop. Thereafter, Meza attended a meeting that defendant had called at his house. Defendant emerged from the bedroom displaying a .38-caliber Smith & Wesson revolver in poor condition. He or Ronaldo Ayala asked Meza if they could use some of Meza's guns, which were of better quality, for the

impending robbery of "a large quantity of drugs" that defendant said Dominguez was then obtaining "from the other side of the border." (Meza testified that he owned a variety of firearms: a .45-caliber, .357-caliber and .380-caliber, all presumably pistols; a 30-30, a 30-06, and an AR-15 rifle; and an Uzi.) The three discussed a plan for the crime, in which they would tie up the victims and wait for Dominguez's wife to arrive in an orange van with the drugs during that evening. The victims were all to be killed.

Castillo was Dominguez's employee. He testified that Dominguez and Zamora, who was Dominguez's brother-in-law, ran a heroin distribution business at the shop. Castillo helped to prepare, package, and deliver heroin. Defendant was also a heroin user.

Castillo testified that a week before the killings he spoke with defendant about Dominguez's whereabouts. Dominguez was in jail, apparently for minor offenses. But Dominguez told Castillo to tell anybody asking that he was in Mexico, and Castillo so told defendant. Defendant did not believe Castillo, so Castillo told the truth. But defendant appeared skeptical of that information also, so Castillo reverted to his story that Dominguez was traveling south of the border.

About noon on the day of the killings, Castillo injected a dose of heroin off the premises and returned to work at the shop. The drug had a stabilizing effect on Castillo, who also testified that using it that day did not impair his ability to work.

About 5:00 p.m. Castillo, defendant, Ronaldo Ayala, Moreno, and Dominguez were all present on the premises. Later, around dusk, Castillo looked up and saw defendant pointing a pistol at him. He

escorted him to the office at gunpoint, where Ronaldo Ayala, also armed with a gun, was holding Dominguez, Zamora, and Rositas captive. They had all been bound with duct tape.

Defendant said to Dominguez something like, "Didn't you know you had to go through us?"

Moreno then bound Castillo's hands behind his back with duct tape. When Moreno was taping him he tried to shift his hands so as to keep them as free as possible.

Ronaldo Ayala announced that he "[w]anted $ 10,000 or someone was going to die," Castillo further testified. Dominguez responded, "Hey, homeboy, nunca te h[e] hecho nada [I've never done anything to you]." Apparently nobody had $ 10,000, but Castillo volunteered that he had hidden some money under the driver's seat of a tow truck parked outside—a ruse, as he had money only in his pocket. At that time, defendant extracted the pocket money, accused Castillo of lying, and stabbed him in the upper left leg.

Moreno left to inspect the tow truck. On his return, he informed his accomplices that the truck contained no money. Ronaldo Ayala urged that Castillo be taken out to get the money, but defendant, speaking to Castillo, said he preferred to "blow you away." Castillo responded, "Gosh, it's there, homeboy. ... It's in the truck. I just put it there."

Ronaldo Ayala shoved defendant and quieted him. Then, with a gun in one hand, he began to escort Castillo outside, holding him by his jacket with the other hand and warning him that if he tried to run when the garage door opened—precisely Castillo's

plan—he would kill him.

Ronaldo Ayala told Moreno to open the garage door slowly, and Castillo feigned that he was trying to squeeze under it, but could not do so. In fact his feint was disguising the fact that he was propping the door up with his body. Unknown to the assailants, the door was defective, and would slam down unless supported. Once Moreno had raised it far enough for Castillo to escape, and also had relaxed his own hold on the door (which Castillo could sense by the door's weight on him), Castillo bolted underneath, and the door slammed down, surprising Ronaldo Ayala and Moreno.

Still bound at the hands, Castillo ran toward the street. Ronaldo Ayala and Moreno managed to open the garage door, and a shot was fired at Castillo, wounding him in the back. He fell onto South Forty-third Street. As he lay in the street he heard more shots. Then he saw a police car come into view, and the police took control of the scene.

Castillo acknowledged that he had testified falsely on prior occasions with respect to heroin-related activity at the body shop, denying any knowledge that Dominguez or Zamora sold the drug. He testified at trial that he did this for the sake of the murder victims' families: he did not want to taint their memories of the dead. He also testified that he never returned to using heroin or methadone after the killings. "I didn't need it no more" because "I accepted the Lord as my savior" some eight months later.

There was testimony that defendant's fingerprints had been found on items recovered from the body shop office. (See *post*, at p. 278.)

A police officer, Tony D. McElroy, testified that he

found Castillo in the street and discovered bodies inside the automobile body shop. He questioned Castillo, who told him that the perpetrators were three Mexicans. One, he told Officer McElroy, was wearing a red Pendleton-type jacket. Before describing anyone else he said he only wanted to answer further questions with a lawyer present.

Defense Case

Defendant did not testify at the guilt phase. But the defense theory was that third parties were responsible for the murders: either two young Latino men, one of whom was wearing a Pendleton-style shirt or jacket, or men who lived behind the body shop and who were also merchandising drugs. And Castillo was in league with them, and testified against defendant to turn suspicion away from the real killers, who might otherwise exact revenge against him.

Regarding the first theory: Traci Lynn Pittman testified that on the night of the murders she was at a liquor store across South Forty-third Street. She saw two Hispanic men walk from that liquor store to the complex containing the automobile body shop and disappear into it. One wore a red-and-black plaid Pendleton-style shirt or jacket. As they passed her she noticed that one appeared to be concealing a bulky object, which could have been a gun. Neither looked the same as defendant. The lighting at the scene was poor and she could not see where they went. But a minute or two later a man (evidently Castillo) emerged running from the complex and fell onto South Forty-third Street as shots rang out. Pittman took shelter in the liquor store.

As mentioned, the other defense theory was that

men living behind the automobile body shop, themselves drug dealers, had committed the murders. There was testimony that Hector Antonio Figueroa Hernandez, known by his nickname "Tony," and Eduardo "Lalo" Sanchez lived in that locale. Figueroa moved there about four days after the killings. After Figueroa moved in, Sanchez's uncle saw him and Sanchez wearing guns at the waist. Sanchez had a .22-caliber gun, and Figueroa had a .38. It appeared, from sudden increases in household wealth and unusual activity, that Sanchez and Figueroa had begun a drug-dealing business. Sanchez's uncle reported his suspicions to the police.

ISSUES ON APPEAL

I. Jury Selection Issues

Defendant exhausted all of his peremptory challenges and expressed dissatisfaction with the jury as sworn. He raises several claims regarding jury selection. As we will explain, the trial court erred in permitting the prosecutor to explain ex parte and outside defendant's presence his reasons for peremptorily challenging certain prospective jurors. But the error was harmless.

A. Holding Ex Parte Hearings on Reasons for Peremptory Challenges

Three times, and with respect to seven prospective jurors, defendant argued that the prosecutor was exercising peremptory challenges to jury panelists on the basis of their race or ethnicity. Such an action would, of course, be improper. (*People v. Wheeler* (1978) 22 Cal. 3d 258, 276-277; *Batson v. Kentucky* (1986) 476 U.S. 79.)

The trial court asked the prosecution to explain

its reasons for the challenges. After the prosecutor said he did not wish to reveal his strategy, the court declared that it planned to hold an ex parte hearing from which defendant and his counsel would be excluded. Defense counsel stated that he had no objection to being excluded from discussions of strategy, but that "I think I am entitled to be present" otherwise, in case the prosecution's "statement is a misstatement of the facts" and to "make sure the record is clear as to what the statement of facts is." The court held three ex parte hearings, and ruled each time that the prosecutor was not challenging jury panelists because of race or ethnicity. At issue here is the propriety of the hearings at which the court reached its decisions.

"Under *Wheeler*, there is a presumption that a prosecutor uses his peremptory challenges in a constitutional manner. [Citation.] The defendant bears the burden to show, prima facie, the presence of purposeful discrimination. [Citation.] If he succeeds, the burden shifts to the prosecutor to show its absence." (*People v. Alvarez* (1996) 14 Cal. 4th 155, 193.)

The details of the procedure for conducting an inquiry on a claim of improper group bias against prospective jurors are well known. In the first step of the three-part *Wheeler* inquiry, " ' "[i]f a party believes his opponent is using his peremptory challenges to strike jurors on the ground of group bias alone, he must raise the point in timely fashion and make a prima facie case of such discrimination to the satisfaction of the court. First, ... he should make as complete a record of the circumstances as is feasible. Second, he must establish that the persons excluded are members of a cognizable group within

the meaning of the representative cross-section rule. Third, from all the circumstances of the case he must show a strong likelihood [or reasonable inference] that such persons are being challenged because of their group association ...." ' " (*People v. Box* (Aug. 17, 2000, S019798) ___ Cal.4th ___ [p. 25].) Next, the burden shifts to the challenged party to provide a race-neutral explanation for the exercise of peremptory challenges. (*People v. Hayes* (1999) 21 Cal. 4th 1211, 1284.) At the third step of the *Wheeler* challenge process—the determination by the trial court whether the opponent of the peremptory challenge has proved purposeful racial discrimination—the trial court must consider at least two possibilities. If the prosecutor acknowledges that he challenged a prospective juror for an impermissible reason (see *U.S. v. Thompson* (9th Cir. 1987) 827 F.2d 1254, 1256, fn. 1), then, of course, the *Wheeler* motion must be granted. If the prosecutor does not so state, but instead offers the court race-neutral reasons, it must still determine whether those stated reasons are untrue and pretextual. (*People v. Alvarez*, *supra*, 14 Cal. 4th 155, 196.)

Provided that the inquiry proceeds within the general framework just articulated, no particular procedures are constitutionally required. As the United States Supreme Court said of *Batson* hearings, "It remains for the trial courts to develop rules, without unnecessary disruption of the jury selection process, to permit legitimate and well-founded objections to the use of peremptory challenges as a mask for race prejudice." (*Powers v. Ohio* (1991) 499 U.S. 400, 416.) "The response of courts across the country has created a rather wide spectrum, ranging from those that recommend an adversary proceeding of some type to those that

permit the prosecutor's explanation to be received in camera and ex parte." (*Gray v. State* (1989) 317 Md. 250, 257 [562 A.2d 1278, 1282].)

Preliminarily, we review for an abuse of discretion the trial court's implicit rulings that the prosecution presented matters of strategy that justified ex parte hearings during challenges on *Wheeler* grounds.

At the end of the first ex parte hearing, the trial court implied, and implicitly found, that the prosecutor had "divulge[d] certainly to some extent prosecution strategy in terms of jury selection." During the second and third hearings, the court impliedly so ruled again, ordering, without prompting from the prosecutor, that the proceedings be sealed.

In the first and second hearings, the prosecutor said that he was disposed to challenge prospective jurors who were unable to express themselves well, or who appeared to be "nonconformist." (See *People v. Wheeler*, *supra*, 22 Cal. 3d 258, 275 [peremptory challenge may be exercised against one whose "clothes or hair length suggest an unconventional lifestyle"].) In sum, he was simply giving the reasons for his challenges, reasons that defendant was entitled to hear and that disclosed no secrets of trial strategy. It was unreasonable to exclude defendant from those hearings.

At the third hearing, the prosecution mentioned its 10-point rating system for prospective jurors, a rating given by a three-person committee including a psychologist, and the prosecutor discussed individual committee members' ratings of various prospective jurors. Even so, he was not divulging strategic information that defendant could use to his

advantage at trial—he was merely describing the prosecution's system of jury selection, a process to which defendant was a passive bystander.

Given that no matters of trial strategy were revealed, we conclude that the court abused its discretion in implicitly or explicitly ruling that they were.

The next question is whether it was error to exclude defendant from participating in the hearings on his *Wheeler* motions. We conclude that, as a matter of state law, it was.

As a general matter, ex parte proceedings are disfavored. (See generally *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal. 4th 1178 [excluding public from proceedings]; *People v. Wright* (1990) 52 Cal. 3d 367, 402 [ex parte communications with jurors]; *People v. Beeler* (1995) 9 Cal. 4th 953, 1014 (conc. and dis. opn. of Kennard, J.).) "Two basic defects are typical of ex parte proceedings. The first is a shortage of factual and legal contentions. Not only are facts and law from the defendant lacking, but the moving party's own presentation is often abbreviated because no challenge from the defendant is anticipated at this point in the proceeding. The deficiency is frequently crucial, as reasonably adequate factual and legal contentions from diverse perspectives can be essential to the court's initial decision ...." (*United Farm Workers of America v. Superior Court* (1975) 14 Cal. 3d 902, 908.)

Ex parte proceedings following a *Wheeler* motion may create similar problems and, in the main, it is error to conduct them. "In the rare case in which the explanation for a challenge would entail confidential communications or reveal trial strategy, an *in*

camera discussion can be arranged." (*Georgia v. McCollum* (1992) 505 U.S. 42, 58.) This, however, is not such a case.

The question whether ex parte communications are proper in ruling on a *Wheeler* motion has not arisen in California decisional law. But the same or closely related issues have arisen in federal and other state cases discussing analogous motions brought under *Batson v. Kentucky, supra*, 476 U.S. 79. While some decisions have tolerated an ex parte *Batson* hearing procedure on the ground that the United States Constitution permits it (*U.S. v. Tucker* (7th Cir. 1988) 836 F.2d 334, 340; *U.S. v. Davis* (6th Cir. 1987) 809 F.2d 1194, 1202), it seems to be almost universally recognized that ex parte proceedings following a motion regarding peremptory challenges allegedly made on the basis of improper group bias are poor procedure and should not be conducted unless compelling reasons justify them. (*People v. Hameed* (1996) 88 N.Y.2d 232, 237-238 [644 N.Y.S.2d 466, 469, 666 N.E.2d 1339, 1342]; *U.S. v. Roan Eagle* (8th Cir. 1989) 867 F.2d 436, 441; *Gray v. State, supra*, 317 Md. 250, 257-258 [562 A.2d 1278, 1282]; *U.S. v. Tindle* (4th Cir. 1988) 860 F.2d 125, 132-133 (conc. & dis. opn. of Murnaghan, J.); *U.S. v. Garrison* (4th Cir. 1988) 849 F.2d 103, 106; *U.S. v. Tucker, supra*, 836 F.2d at p. 340; *U.S. v. Gordon* (11th Cir. 1987) 817 F.2d 1538; *Goode v. Shoukfeh* (Tex. 1997) 943 S.W.2d 441, 452 [civil case].) We agree.

U.S. v. Thompson, supra, 827 F.2d 1254, presented the issue and the countervailing values involved: "The question presented to us is ... whether the district judge erred by permitting the [prosecutor] to state her reasons to him ex parte and then ruling on the objection without divulging the

reasons to defense counsel. In resolving this issue we must consider and reconcile two fundamental principles of our criminal justice system. The first is that the district judge has broad discretion to fashion and guide the procedures to be followed in cases before him. [Citations.] The second principle is that adversary proceedings are the norm in our system of criminal justice, [citation], and ex parte proceedings the disfavored exception." (*Id.* at p. 1257.)

U.S. v. Thompson, *supra*, 827 F.2d 1254, further explained: "The right of a criminal defendant to an adversary proceeding is fundamental to our system of justice. [Citations.] This includes the right to be personally present and to be represented by counsel at critical stages during the course of the prosecution. [Citation.] This is not mere idle formalism. Our system is grounded on the notion that truth will most likely be served if the decisionmaker—judge or jury—has the benefit of forceful argument by both sides....

"There are, to be sure, occasional departures from this norm. The district judge makes an ex parte review of the prosecution's evidence to determine whether it falls within the rule of *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196, 10 L. Ed. 2d 215 (1963). [Citations.] Also, the district judge normally considers on an ex parte basis whether to reveal to the defense the identity of a government informant. [Citation.] But, as these examples illustrate, situations where the court acts with the benefit of only one side's presentation are uneasy compromises with some overriding necessity, such as the need to act quickly or to keep sensitive information from the opposing party. Absent such compelling justification, ex parte proceedings are anathema in our system of justice and ... may

amount to a denial of due process." (*U.S. v. Thompson, supra*, 827 F.2d 1254, 1258-1259.)

In addition to the foregoing general considerations, it is error in particular to conduct ex parte proceedings on a *Wheeler* motion because of the risk that defendant's inability to rebut the prosecution's stated reasons will leave the record incomplete. We discuss this problem *post*, at page 18.

We turn to the question of prejudice. We have concluded that error occurred under state law, and we have noted *Thompson's* suggestion that excluding the defense from a *Wheeler*-type hearing may amount to a denial of due process. We nonetheless conclude that the error was harmless under state law (*People v. Watson* (1956) 46 Cal. 2d 818, 836), and that, if federal error occurred, it, too, was harmless beyond a reasonable doubt (*Chapman v. California* (1967) 386 U.S. 18, 24) as a matter of federal law. On the record before us, we are confident that the challenged jurors were excluded for proper, race-neutral reasons.

As mentioned, the ex parte hearings pertained to seven prospective jurors. With respect to Olanders D., the prosecutor stated he had exercised the challenge in part because his questionnaire indicated he opposed the death penalty. The prosecutor acknowledged Olanders D.'s oral statements that his views had changed, but commented that his answers were "not totally responsive to the questions of either counsel for the defense or myself." He further stated, in essence, that Olanders D.'s difficulties in communicating led him to question whether he would "fit in" on the jury. The court disagreed with the latter point, noting, "it may well be that he would get along very well with 12 people," but added: "I think the other observations of counsel are accurate and

borne out by the record."

In the ex parte discussion of Galileo S., the prosecutor indicated that on *Hovey* voir dire (*Hovey v. Superior Court* (1980) 28 Cal. 3d 1, 80-81) to determine his attitudes toward the death penalty, the prospective juror showed that he was a "nonconformist person who has had numerous run-ins with the law. We determined through his rap sheets that he has three or four more arrests other than those that he has told us about." Moreover, the prosecutor also asserted that "his attitude is such that I think it would create alienation and hostility on the part of the other jurors." The trial court agreed, commenting on Galileo S.'s "paranoia ... concerning the justice system."[1]

With respect to Barbara S., the prosecutor said that he had assigned her a rating of zero on the prosecution team's 10-point scale, and that the other two reviewers had given her a three and a six. "During the questioning process ... I very quickly formed the opinion that there was something wrong with [Barbara S.]. Her responses were extremely slow, and I began to suspect that she was possibly under the influence of drugs. [¶] ... [S]he had ... an empty look in her eyes, ... a lack of really being totally in tune with what was going on." He noted further that her "answers did not make sense, that they did not relate to the questions presented." He also commented that Barbara S. appeared "somewhat

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[1] Our own review of the record tends to confirm some of these observations. Galileo S. referred to the average juror as "Joe Six-Pack," and he stated that "[m]ost people bother me." He also exhibited a somewhat flippant attitude in responding to various questions during general voir dire.

angry" when she initially came into court. The trial court disagreed with the last point, interpreting her demeanor as reflecting nervousness rather than hostility. But it concluded that overall it "certainly [could not] quarrel" with the prosecutor's impressions of Barbara S. or with the peremptory challenge based on her individual characteristics.

With respect to Gerardo O., the prosecutor cited in justification of his excusal his difficulties in writing, understanding and reading English. He also mentioned his idiosyncratic dress and demeanor, his evident aloofness from other prospective jurors, and his inability to articulate any opinion about the death penalty. The trial court noted that the record supported the prosecutor's assessment of Gerardo O.'s responses.[2]

The prosecutor justified his challenge of George S. on the ground he had served on a jury once before and was the holdout juror, which made the prosecutor feel "extremely uneasy." On the prosecution evaluation committee's 10-point scale, the prosecutor had rated George S. about one; the other two members had rated him at one and two. The prosecutor mentioned he thought George S. was

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[2] Our own review of the record tends to confirm these observations. Gerardo O. acknowledged on voir dire that someone else had to complete his questionnaire for him. He appeared to have difficulty understanding the nature of the proceedings the jury might have to follow, and he admitted to defense counsel that he did not understand some of his questions. Following, and despite, defense counsel's thorough examination, when the prosecutor asked Gerardo O. if he understood that the government was seeking the death penalty against defendant, he said, "I didn't know that." Gerardo O. also stated he was unsure whether he could impose the death penalty.

Greek (as his surname might suggest), rather than Hispanic, as the defense implied in making the *Wheeler* motion, "but I wasn't paying attention to the racial aspect of the case." The prosecutor offered additional reasons for the challenge: George S. had once applied to be a police officer but was rejected, and the prosecutor feared it might have been for psychological reasons. Further, the prosecutor expressed unease with his *Hovey* voir dire responses. (*Hovey v. Superior Court*, *supra*, 28 Cal. 3d 1, 80-81.) The trial court confirmed the accuracy of the prosecutor's observations.

With respect to Luis M., the prosecutor explained he exercised the challenge because the prospective juror was leery of the death penalty and because he had investigated the case on his own, prior to *Hovey* voir dire. Luis M. had stated: "In my neighborhood ... some people happen to know the accused, and I just questioned a couple of people [about] the character of the [defendant]." Luis M. had also made inquiries regarding the facts of the case. The court stated that the peremptory challenge was proper.

With respect to Robert M., the prosecutor reminded the trial court that he had passed on challenges to the jury at one point, leaving Robert M. seated. He stated he had rated Robert M. between a four and a five, while the other prosecutorial reviewers had assigned him ratings of four and five, respectively. He explained that he had determined, before beginning the selection process, that he would prefer not to have jurors who scored five or less, and that he ultimately exercised the challenge because he was skeptical Robert M. could impose the death penalty. The court noted that although Robert M.'s questionnaire indicated he favored the death penalty,

his voir dire answers varied to an extent that one might entertain a legitimate concern whether he could impose it, and it agreed that was an appropriate reason for a peremptory challenge.

In summary, the record reveals the following facts in support of the view that the prosecutor was not engaged in racial or ethnic discrimination. The court credited the prosecutor's opinions that Olanders D. opposed the death penalty, that Barbara S. was in a dazed state, that George S. had been a holdout juror and had been rejected for a law enforcement position, and that Robert M. was less than desirable from the prosecution's point of view. Galileo S., among other deficiencies, had (unless the prosecutor was misleading the court) not been honest regarding his criminal past. Luis M. admitted that he had investigated the case. Gerardo O. struggled with English and did not understand the proceedings. A prosecution committee, including a psychologist, gave Barbara S., George S., and Robert M. poor or mediocre suitability ratings. George S.'s surname is not obviously Spanish, and the prosecutor stated that he was unaware of his Hispanic heritage.

On these facts, we are confident that the prosecutor was not violating *Wheeler*, and that defense counsel's presence could not have affected the outcome of the *Wheeler* hearings.[3] Moreover, the

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[3] The dissent does not come to grips with the record's strong factual base for our conclusion that the error was harmless. It evidently concludes that one need not, and should not, "credit this record." (Dis. opn., *post*, at p. 298.)

We will not "credit this record" willy-nilly, but we are obliged to scrutinize it closely. We are mindful that whether or not of federal constitutional dimension, the error here is not structural; it is an error in the conduct of the trial that requires

(continued...)

trial court's rulings in the ex parte hearing indisputably reflect both its familiarity with the record of voir dire of the challenged prospective jurors and its critical assessment of the prosecutor's proffered justifications. To the extent the rulings expressed agreement with the prosecutor's characterizations of the prospective jurors and their responses, they also support the court's implicit conclusion that the prosecutor did not fabricate his justifications and they were grounded in fact.

Defendant argues that the court's error in holding the *Wheeler* hearings ex parte was prejudicial because his lack of opportunity to rebut the prosecution's justifications for the challenges resulted in an incomplete record. We have agreed that such a result is theoretically possible. It is a reason for our conclusion that holding an ex parte hearing on a *Wheeler* motion ordinarily is state law error.

In particular, defendant maintains that a prosecutor might offer a reason unanticipated by the defense that sounds neutral, but in fact is untrue. His point is this: he is required, in making his prima facie case, to try to anticipate all the justifications the prosecutor may have for peremptorily challenging the prospective juror. But there are some he simply may not be able to anticipate. For example, the prosecutor might declare that he challenged a

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(...continued)
us to consider the record. In other words, the error does not fall within the category of those that the law recognizes as reversible per se, i.e., "affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself," " 'transcend[ing] the criminal process' " and "defy[ing] analysis by 'harmless-error' standards." (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309-311.)

prospective juror because he silently mouthed an obscenity toward the prosecution table during voir dire. Defense counsel might not have noticed that act. But having been apprised of it, they could point out that other unchallenged prospective jurors did the same thing, that the prosecutor saw them do it, that those prospective jurors were not in a protected group, and that he did not peremptorily challenge them. (Accord, *U.S. v. Thompson*, *supra*, 827 F.2d 1254, 1260.)

Although such a possibility exists in the abstract, nothing suggests that something similar occurred here. Rather, the trial court heard the criteria the prosecutor articulated—criteria furnishing reasons for the challenges that were, at a minimum, plausible, and that the record often supports—and expressly agreed that each of the excusals was proper. It impliedly found the prosecutor's stated justifications to be honest. We will not reverse the judgment on the basis of speculation regarding theoretical possibilities of the type discussed above.

A second concern, voiced by the *Thompson* majority, was that a prosecutor might offer a reason that is legally improper—i.e., the product of impermissible group bias—but that the trial court overlooks. (*U.S. v. Thompson*, *supra*, 827 F.2d 1254, 1260.) That was the case in *People v. Snow* (1987) 44 Cal. 3d 216, in which the trial court admitted that it was unfamiliar with *Wheeler* (*Snow*, *supra*, 44 Cal. 3d at pp. 224, 226) even though "[v]oir dire occurred ... several years after *Wheeler* was filed." (*Id.* at p. 224.) In this case, however, the court was thoroughly familiar with *Wheeler* and the requirements that case imposed. We have now reviewed the records of two cases tried by this superior court judge in respect of

the same crimes: defendant's and Ronaldo Ayala's (*People v. Ayala* (2000) 23 Cal. 4th 225). In both, the trial judge showed himself to be in command of the law and the facts. He was diligent, prepared, knowledgeable, and engaged in the proceedings, including those relating to defendant's *Wheeler* motion. The concern voiced in *Thompson*, though real in the abstract and bearing fruit in *People v. Snow*, *supra*, 44 Cal. 3d 216, is of no moment in this case.

U.S. v. Thompson, *supra*, 827 F.2d 1254, is distinguishable in additional respects from this case. First, the *Thompson* majority, observing that all it had before it concerning the propriety of the challenges was the prosecutor's explanation of her reasons and the district judge's ruling, professed itself unable to place confidence in the latter in the face of the record's "[un]reassuring" "silence." (*Id.* at p. 1261.) Here, by contrast, the record, even if not as complete as it might have been had defendant participated in the ex parte hearings, is well developed. In particular, the trial court's remarks constitute a valuable assessment of the prosecutor's justifications. Second, the *Thompson* majority noted that in attempting to justify one of her challenges, the prosecutor cited the fact that the prospective juror and defendant were both Black. (*Id.* at p. 1260; see *id.* at p. 1256, fn. 1.) As the *Thompson* majority correctly observed, "the fact that the potential juror might identify too much with the defendant because they are of the same race is precisely what *Batson* said [is] not legitimate." (*Id.* at p. 1260.) A reviewing court might well entertain a reasonable doubt regarding the propriety of the challenge on such a record. But nothing comparable appears in the record before us.

In sum, when a trial court decides to hold a *Wheeler* hearing, it is possible, in the abstract, that the defense's contribution might make a difference in the ultimate ruling, which is why *Wheeler* hearings generally should be adversarial. On this well-developed record, however, we are confident that defense counsel could not have argued anything substantial that would have changed the court's rulings. Accordingly, the error was harmless.

Defendant also contends that the error violated his rights to be present and to be represented by counsel as guaranteed by the state and federal Constitutions and by California statutory law. (See U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 15; Pen. Code, §§ 977, subd. (b), 1043, subd. (a); *People v. Waidla* (2000) 22 Cal. 4th 690, 741-742.) And he claims violations of rights under the Fifth, Eighth, and Fourteenth Amendments to the federal Constitution. We need not address these contentions in detail, for our analysis shows that the erroneous exclusion of the defense from the *Wheeler* hearing was harmless beyond a reasonable doubt under the federal constitutional standard of *Chapman v. California*, *supra*, 386 U.S. 18, 24, and also harmless under the state law standard of *People v. Watson*, *supra*, 46 Cal. 2d 818, 836. (Cf. *Rushen v. Spain* (1983) 464 U.S. 114, 118-119 (*per curiam*) [assuming the trial court's erroneous ex parte communications with juror implicated the defendant's federal constitutional rights to presence and to counsel, the error was harmless]; *People v. Wright*, *supra*, 52 Cal. 3d 367, 402-403 [same]; *People v. Hogan* (1982) 31 Cal. 3d 815, 849-850 (lead opn.), disapproved on another ground in *People v. Cooper* (1991) 53 Cal. 3d 771, 836 [temporary absence of counsel during jury deliberations assessed under harmless error

standard]; *People v. Knighten* (1980) 105 Cal. App. 3d 128, 132-133 [same].)

B. Challenge Regarding Rights of Excluded Prospective Jurors

In tandem with his *Wheeler* claim, defendant also maintains that the ex parte proceedings make it impossible to determine whether race-based exclusion may have occurred, to the detriment of prospective jurors who enjoy a right under the equal protection clause not to be discriminated against in jury selection on the basis of race. (*Powers v. Ohio*, *supra*, 499 U.S. 400, 409.) Again, on the record before us, we are confident that no such exclusion occurred. The prosecutor articulated, at a minimum, plausible criteria for his excusals, the trial court agreed that the excusals were proper, and to the extent the written record before us touches on the prosecutor's stated reasons, it confirms that they were not pretextual.

C. Loss of Certain Prospective Jurors' Questionnaires

Defendant claims that his constitutional right to a meaningful review of his conviction and sentence has been infringed by the loss of the bulk of prospective juror questionnaires. The questionnaires of the seated jurors and alternates were preserved, but almost all others have been lost.

As a general matter, we disagree. We addressed, and rejected, a similar claim in *People v. Alvarez*, *supra*, 14 Cal. 4th 155, where we said: "[D]efendant maintains that his *Wheeler*[-]*Batson* claim must be resolved in his favor on the ground that the record on appeal is not adequate to permit meaningful review. The deficiency of which he complains is the absence

of certain questionnaires, which were completed by prospective jurors, then lodged with the superior court, subsequently lost by its clerk's office, and finally determined by the superior court to be beyond reconstruction. A criminal defendant is indeed entitled to a record on appeal that is adequate to permit meaningful review. That is true under California law. [Citation.] It is true as well under the United States Constitution—under the Fourteenth Amendment generally, and under the Eighth Amendment specifically when a sentence of death is involved. [Citation.] The record on appeal is inadequate, however, only if the complained-of deficiency is prejudicial to the defendant's ability to prosecute his appeal." (*Id.* at p. 196, fn. 8.)

With regard to the prospective jurors whose questionnaires were lost but who are not identified by defendant as the subject of *Wheeler* challenges, this court will not in any event compare the views of those jurors excused by peremptory challenges with those who were not excused on that basis. (*People v. Jackson* (1996) 13 Cal. 4th 1164, 1197; cf. *id.* at pp. 1248-1249 (conc. opn. of Mosk, J.) [urging a contrary approach].) Under this court's precedent, therefore, the loss of the questionnaires could not have prejudiced him. With regard to the prospective jurors whose questionnaires were lost and who were the subject of *Wheeler* challenges, we have already explained that the record is sufficiently complete for us to be able to conclude that they were not challenged and excused on the basis of forbidden group bias. Thus, even if there was federal error, it was harmless beyond a reasonable doubt (*Chapman v. California*, *supra*, 386 U.S. 18, 24), and under state law any error also was harmless (*People v. Watson*, *supra*, 46 Cal. 2d 818, 836).

D. Denying Motions to Discharge the Jury Panel and Certain Prospective Jurors for Cause or Continue the Trial Because of News Accounts

Defendant's brother Ronaldo Ayala was tried shortly before defendant for crimes arising from the same events. In the aftermath of news coverage of the death sentence imposed on Ronaldo Ayala, defendant moved either to dismiss the jury panel or to continue the trial until the coverage's effects had lessened. He also moved to excuse certain prospective jurors for cause, namely their exposure to the coverage. The trial court denied his motions, and he claims error as a result.

The People contend that defendant failed to preserve his claim for review, to the extent his motion sought discharge of the jury panel, because the trial court denied the motion as premature without prejudice, pending voir dire, and he failed to renew it afterward. The question is close, but we disagree. The People are correct that the court denied the motion to discharge the panel as premature. It appears, however, that the court may have reiterated its prior denial of the motion to discharge the panel at the point at which defendant moved to be equipped with additional peremptory challenges—in other words, when jury selection was well underway. At least implicitly, the court finally denied the motion. We will proceed to decide the matter on the merits.

Doing so, we observe that there was no need to discharge the jury panel unless, after the jury was selected, jurors were sworn who, because of their knowledge of the trial or sentence, or both, of Ronaldo Ayala, could not be fair in defendant's case. (See *People v. Pride* (1992) 3 Cal. 4th 195, 228-229.)

Near the end of jury selection, the trial court stated that it had excused for cause "any juror[s] that showed a slight leaning that [knowledge of Ronaldo Ayala's case] might well impact their ability to be fair to [defendant] ...." The parties agree that defendant challenged 36 panelists for cause on the basis of their knowledge of the Ronaldo Ayala case, and that of those, 13 were excused, leaving 23. Defendant acknowledges that those 23 prospective jurors agreed that their knowledge of the Ronaldo Ayala case would not affect their ability to try his fairly. He claims, however, that the opposite must be true because Ronaldo Ayala's death sentence was reported on television and in the newspapers, and the prospective jurors were exposed to the information.

That, however, is not enough. Defendant's claim is purely speculative. He acknowledges that the panelists testified that they would not be improperly affected by their knowledge of the sentence in Ronaldo Ayala's case. He produces no evidence to support his claim that the jury panel was irremediably tainted by exposure to Ronaldo Ayala's case and should have been excused. For the same reason, his argument that his motion to continue the case should have been granted is without merit.[4]

Defendant next contends that eight prospective jurors should have been removed for cause because they could not be fair and impartial.

"Either party may challenge an individual juror

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[4] Defendant also claims that the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their equivalents in article I, sections 15, 16, and 17 of the California Constitution, were violated. For the reasons explained in the text, we do not agree.

for 'an actual bias.' [Citation.] 'Actual bias' in this context is defined as 'the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party.' [Citations.] A sitting juror's actual bias that would have supported a challenge for cause also renders the juror unable to perform his or her duties and thus subject to discharge. [Citation.] 'Grounds for ... discharge of a juror may be established by his statements or conduct, including events which occur during jury deliberations and are reported by fellow panelists.' [Citation.] The term 'actual bias' may include a state of mind resulting from a juror's actually being influenced by extraneous information about a party." (*People v. Nesler* (1997) 16 Cal. 4th 561, 581 (lead opn.).)

" 'On review, if the juror's statements are equivocal or conflicting, the trial court's determination of the juror's state of mind is binding. If there is no inconsistency, we will uphold the court's ruling if it is supported by substantial evidence. [Citations.]' [Citation.] A juror's bias need not be proven with unmistakable clarity. [Citations.] Rather, it is sufficient that the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law in the case before the juror.' " (*People v. Carpenter* (1999) 21 Cal. 4th 1016, 1035.)

We turn to the specific prospective jurors to whom defendant refers.

Charles G. had read a newspaper article about the killings in 1985 when they occurred, and was vaguely aware that another man, whose name he could not

recall, had recently been sentenced to death as a result. He denied that he would be influenced by Ronaldo Ayala's sentence; rather, it was possible that "two people might be accused and only one of them is guilty." Acknowledging that defendant might prefer jurors who were "absolutely ... ignorant of the situation," he testified that he could be fair and impartial. "I'd only judge by the trial that I'm on."

The trial court ruled that Charles G. could be impartial despite his awareness of Ronaldo Ayala's case. The record supports its ruling. There was no error in denying the challenge for cause.

Lois B. testified on voir dire that she worked at home and would keep the television on in the background. By that means she might have heard something about the case, but she did not pay attention to it. She thought that defendant's brother might have been convicted of crimes, but was not sure. She stated in essence that this fleeting exposure would not affect her ability to be impartial.

Defense counsel challenged Lois B. as an afterthought, and only because "[i]t's my intention to challenge any juror who has knowledge of Ronaldo Ayala's case." Her challenge was so perfunctory that the trial court did not explicitly rule on it. But it told the prospective juror to await further instructions, and so implicitly denied it. The record supports its implicit ruling. There was no error in denying the challenge for cause.

Charles C. testified on voir dire that he had what may be characterized as an extremely vague recollection that there might have been another trial arising from the killings and that someone may have been convicted. He testified that "my knowledge is so

hazy that I'm not going to rely on it."

The trial court ruled that Charles C.'s knowledge of the case was trifling and that he could be impartial. The record supports its ruling. There was no error in denying the challenge for cause.

Catherine S. had only the faintest memory of Ronaldo Ayala's case. She recalled reading or hearing that another criminal defendant with the same last name had been convicted of something, but knew nothing more and knew nothing about the Ronaldo Ayala proceedings or outcome. The trial court denied without comment defendant's challenge for cause, which was based as much on counsel's suspicion that "I'm not sure she's been entirely candid" as on what she said on voir dire.

On this record, we see no evidence that Catherine S.'s vague awareness of Ronaldo Ayala's trial affected her impartiality. The court's ruling was proper.

Dwight S. testified that he experienced a "bit of exposure" to the legal consequences of the murders when he saw a newspaper headline about Ronaldo Ayala's sentence. He did not read the accompanying article. After completing his questionnaire, he realized that defendant might be Ronaldo Ayala's brother. He testified that he assumed the evidence in the two cases must be different, or the two would have been tried jointly, and that Ronaldo Ayala's sentence would not affect his ability to be impartial. The trial court denied defendant's challenge for cause, commenting that Dwight S. "would make his decision based upon the evidence as it comes in this case."

The record supports the trial court's observation. There was no error in denying the challenge for

cause.

Robert K.'s exposure to publicity was the same as Dwight S.'s. But as in Dwight S.'s case, Robert K.'s answers on voir dire made clear that he would not prejudge the case against defendant. In the abstract, he opined, "one brother can intimidate another brother to come along with him ... or they both can be willing participants." (Indeed, portraying defendant as the deferential follower of Ronaldo Ayala was part of the defense strategy at the penalty phase.) He insisted that he could be impartial. The trial court denied defendant's challenge for cause, and the record supports its decision. There was no error in so ruling.

Ingeburg C. had read a newspaper article reporting Ronaldo Ayala's sentence and mentioning that jury selection in defendant's case was pending. She testified that she only vaguely recalled its content and that "it doesn't affect me"; "I have an open mind, and you have to prove ... that he's guilty."

The trial court denied defendant's challenge for cause. Reviewing the record, we see no evidence that Ingeburg C.'s knowledge of Ronaldo Ayala's sentence affected her impartiality. The record is, rather, entirely to the contrary. The ruling was proper.

The other prospective juror to whom defendant refers, Bette C., was not, in fact, the object of a challenge for cause.

In sum, the court committed no error under state law in respect of any of the contentions defendant presents regarding the aspects of jury selection discussed in this section. Because defendant's constitutional claims are predicated on a violation of state law, they must be rejected.

In addition, defendant claims that the trial court improperly denied a motion to give him additional peremptory challenges. As a result, he claims, three jurors, unable to be impartial because they knew about Ronaldo Ayala's conviction or sentence, or both, were seated.

He refers to Jurors Lois B., Charles C., and Charles G. But as we have explained, there was no evidence of bias among them. Because the factual predicate of his claim is inaccurate, it cannot be sustained on review.

E. Claim of Error in Excusing a Prospective Juror Because of Her Views on Capital Punishment

Defendant claims that the Sixth and Fourteenth Amendments to the United States Constitution were violated when the trial court granted the prosecution's motion to excuse a prospective juror for substantially impaired ability to follow the law regarding capital punishment. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424.)

"As we [have] explained ..., '[w]hen a prospective juror's views about the death penalty "would 'prevent or substantially impair the performance of his [or her] duties as a juror' " [citation], the juror is not impartial and may be challenged "for cause." ' " (*People v. Earp* (1999) 20 Cal. 4th 826, 853.) This test applies equally to defense and prosecution challenges. (*Ibid.*) As stated, " 'if the juror's statements are equivocal or conflicting, the trial court's determination of the juror's state of mind is binding. If there is no inconsistency, we will uphold the court's ruling if it is supported by substantial evidence. [Citations.]' [Citation.] A juror's bias need

not 'be proven with unmistakable clarity. [Citations.] Rather, it is sufficient that the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law in the case before the juror.' " (*People v. Carpenter, supra*, 21 Cal. 4th 1016, 1035.)

Linda J.'s answers were inconsistent. Initially she testified that she would "find it difficult" to return a verdict of death. She stated that she went beyond being unsure about imposing the death penalty; rather, "I don't think I'm capable of that." But she also testified that she favored the death penalty in the abstract, and she hypothesized that the trial might enable her to summon the will to impose it.

After initially denying the prosecution's challenge for cause on the ground that Linda J. was "impaired, but not substantially," the trial court later reversed itself, finding that her ability to serve as a juror was substantially impaired.

Because Linda J.'s answers were inconsistent, but included testimony that she did not think herself capable of imposing the death penalty, we are bound by the trial court's determination that her candid self-assessment showed a substantially impaired ability to carry out her duty as a juror. There was no violation of any constitutional right.

F. Denying Two Challenges for Cause by Defendant

Defendant claims that his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 15, 16, and 17 of the California Constitution were violated when the trial court denied his motions to excuse two prospective jurors for substantially

impaired ability to follow the law regarding capital punishment.

In response to initial questions by the court, Herman J. testified, without qualification or equivocation, that he would not automatically vote for the death penalty if the case reached that stage. Then defense counsel questioned him about his statement on his questionnaire that the death penalty should always be imposed for calculated, methodical murder. In response to leading questions, Herman J. testified, contrary to his response to the court's question, that he would always impose the death penalty for an intentional killing accompanied by a special circumstance, and in essence that he would not pay attention to the defense case in mitigation at the penalty phase.

Asked by the prosecutor whether he could consider mitigating evidence at a penalty phase, Herman J. testified, "I would want to consider the evidence and the additional information. [¶] Even though I felt, maybe, that he should get the death penalty, I would still be willing to consider any other ... additional evidence."

The prosecutor asked: "Are you of the frame of mind that any witness called—if any witness were called by the defense on the subject of mitigating evidence, that that witness would be absolutely wasting his time ... ?" Herman J. responded, "Well, I don't think it should be absolutely concrete. [¶] I would be willing to hear additional statements, or anything that ... might alter the situation. [¶] ... [¶] Even though I believe in the death penalty and all that, I'm not so set in my ways that I wouldn't listen to ... anything that might alter the decision ... " He added that he would not always impose the death

penalty "regardless of the situation or regardless of additional information." He also testified that he could follow an instruction to return a verdict for death only if the aggravating evidence substantially outweighed the mitigating.

Defense counsel then asked Herman J. to explain his inconsistent statements. The prospective juror testified that when "I realized I answered your question by saying ... if found guilty without a shadow of a doubt I would want the death penalty, but I wasn't ... considering the fact that you have additional evidence that alters, possibly alters it. [¶] ... [¶] ... I'm just saying I would ... always be willing to listen to additional evidence ... and possibly change to a life sentence." In sum, Herman J. testified that he might be presented with evidence "important enough to consider the life sentence rather than the death penalty, even though I lean towards the death penalty." But that mitigating evidence would have to be "strong" and "meaningful" to alter his predisposition to impose the death penalty.

Defendant argued, without success, to the trial court that Herman J.'s final answer confirmed what many of his others had suggested: that he would impose the death penalty unless presented with mitigating evidence that substantially outweighed that in aggravation, and hence could not follow his oath. He renews that argument here.

The trial court made no comment on its ruling beyond a statement that Herman J. was not substantially impaired. On this record, we cannot say that substantial evidence did not support the ruling. We believe that Herman J.'s testimony pointed to two views that did not conflict. He testified that his own predilection, unmoored by legal instruction, would be

to impose death unless there was a substantial reason not to. But he also testified, not inconsistently, that he could and would follow an instruction that directed him not to follow his own predilection but instead the law. Substantial evidence supports the court's ruling.

Patricia P.'s daughter was a San Diego County Sheriff's deputy, and her son was a police officer with the Chula Vista Police Department. He had previously been a San Diego police officer. Patricia P. testified that she thought the justice system was too lenient and that a criminal defendant should bear the burden of proving innocence. In her questionnaire, she stated that she favored increased use of the death penalty, and automatic imposition of a capital sentence for multiple murder—one of the special circumstances charged here. But on voir dire examination by defense counsel, she stated that she "would like to think that there would be other options" than the death penalty even in a multiple-murder case. And she also testified that she could follow the law on the presumption of innocence and the requirement of proof beyond a reasonable doubt even if such tenets contradicted her beliefs, that she could consider evidence in mitigation even if defendant were convicted of multiple murders, and that she would follow an instruction that she could not vote for the death penalty unless the aggravating evidence substantially outweighed that in mitigation.

Defendant challenged Patricia P. for cause on the ground that her views of the law substantially impaired her ability to follow her oath as a juror. The court disagreed, stating that "clearly this [prospective] juror is not impaired." Substantial evidence supports that determination. As with

Herman J., there was substantial evidence that she could separate her personal beliefs from her duties as a juror.

In conclusion, we discern no violation of any constitutional provision.

G. Representation of Hispanics and the Young in Jury Pool

Defendant, who is Hispanic, contends that underrepresentation of Hispanics in the jury pool violated his rights under the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 16 of the California Constitution. He also claims that underrepresentation of the young violated his rights to a representative jury pool. He brought the same claims at trial, but the trial court rejected them.

These are the same claims that were presented in *People v. Ayala, supra*, 23 Cal. 4th 225, 256-257.) We rejected them there, and again do so here.

With regard to young people, the trial court ruled that the young are not a cognizable group, but even if they were, there was no improper exclusion of them in the jury selection process.

"California courts have not been receptive to the argument that age alone identifies a distinctive or cognizable group within the meaning of [the representative cross-section] rule." (*People v. McCoy* (1995) 40 Cal. App. 4th 778, 783 [citing cases].) We need not decide, however, whether peremptory challenges on the basis of age violate the strictures of *Batson* or *Wheeler*; defendant simply does not persuade, any more than he does regarding Hispanic jurors, that the young were improperly excluded

under the jury selection system in place. As the People observe, aside from a mention of statistical disparity in the presence of young people as a result of the jury selection process, a factor that does not by itself establish systematic exclusion (*People v. Ayala*, *supra*, 23 Cal. 4th 225, 257), the only fault defendant finds with the process is that the master list of the jury pool was only updated annually, so that those who turned 18 during the year would not be included and some 18 year olds would turn 19. We do not believe that amounts to systematic exclusion. In order to avoid that effect or a similar one, the master list would have to be updated daily. The law does not require such diligence.

II. Guilt Phase Issues

A. Search of the Garage Office and Seizure of Items Therefrom

At trial, defendant filed a motion to exclude evidence obtained from a search of the automobile body shop garage where the murders occurred. (§ 1538.5.) He claimed that (1) searching the premises, and (2) removing therefrom certain small items, namely "vodka containers, orange juice containers and beer cans in which [he had] a proprietary interest," violated his rights under the Fourth Amendment to the United States Constitution and article I, section 13 of the California Constitution.

The evidence regarding the relevant fingerprint evidence is as follows: The police recovered two orange juice containers and a vodka bottle from the office where the victims' bodies lay. One orange juice container was full; the other contained a small amount of liquid. A fingerprint examiner identified

defendant's fingerprint on one of the orange juice containers. An evidence technician had obtained the print, but he failed to note whether it came from the full or the almost empty container. **(16)**

We apply the Fourth Amendment standard in deciding what remedy may be available following a claim of unlawful search or seizure. (*In re Lance W.* (1985) 37 Cal. 3d 873, 886-887; *Bowens v. Superior Court* (1991) 1 Cal. 4th 36, 47.)

" 'An appellate court's review of a trial court's ruling on a motion to suppress is governed by well-settled principles. [Citations.] [¶] In ruling on such a motion, the trial court (1) finds the historical facts, (2) selects the applicable rule of law, and (3) applies the latter to the former to determine whether the rule of law as applied to the established facts is or is not violated. [Citations.] "The [trial] court's resolution of each of these inquiries is, of course, subject to appellate review." [Citations.] [¶] The court's resolution of the first inquiry, which involves questions of fact, is reviewed under the deferential substantial-evidence standard. [Citations.] Its decision on the second, which is a pure question of law, is scrutinized under the standard of independent review. [Citations.] Finally, its ruling on the third, which is a mixed fact-law question that is however predominantly one of law, ... is also subject to independent review.' " (*People v. Alvarez, supra,* 14 Cal. 4th 155, 182.)

The claim is without merit. Even if defendant left the containers at the automobile body shop while there as an invitee or a social guest, he had no expectation of privacy in the premises. " ' "[O]ccasional presence on the premises as a mere guest or invitee" ' " is insufficient to confer such an

expectation. (*U.S. v. Chaves* (11th Cir. 1999) 169 F.3d 687, 691.) Moreover, the trial court found that he had abandoned the containers—a factual finding supported by substantial evidence and to which, accordingly, we defer. Abandoning them, he relinquished any expectation of privacy in them. As a general matter, " 'the overwhelming weight of authority rejects the proposition that a reasonable expectation of privacy exists with respect to trash discarded outside the home and the curtilage thereof.' " (*People v. Machupa* (1994) 7 Cal. 4th 614, 629, fn. 5; see *People v. Roybal* (1998) 19 Cal. 4th 481, 507-508; see also *Abel v. United States* (1960) 362 U.S. 217, 240-241.)

For the foregoing reasons, we find defendant's Fourth Amendment claims to lack merit, and reject them.

B. Radiologist's Testimony on Bullet Size

Defendant claims that the court erred under state law in permitting testimony outside of the expertise of a witness.

Before the radiologist testified, Pedro Castillo testified that two guns were used in the robbery. Defendant had one, Ronaldo Ayala the other. Castillo did not testify that the two exchanged weapons at any point; rather, both kept control of their respective guns. He further testified that a shot was fired at him as he tried to flee and he felt the impact of a bullet. According to other testimony, .22-caliber bullet casings were found on the curb near South Forty-third Street, and a .38-caliber bullet was found in the body shop office, near Dominguez's foot. The murder victims had all been shot exclusively by a .38-caliber gun, except Dominguez, who received one .22-

caliber and one .38-caliber wound. Hence, the best interpretation of the evidence at that point was that defendant shot Rositas and Zamora twice and Dominguez once with his .38-caliber gun, all execution-style, whereas Ronaldo Ayala shot Dominguez once and Castillo with his .22-caliber gun.

That interpretation was buttressed by the testimony of Leland Everett Kellerhouse, Jr., M.D. The shot that hit Castillo remained in his body, so it was decided to tape bullets of known caliber to Castillo's skin and take X-ray photographs capturing those bullets and the one in his body to determine the caliber of the latter projectile. Dr. Kellerhouse, a diagnostic radiologist certified as an expert in that area, was preparing to testify about the content of the X-rays, but defense counsel objected, saying "if he's going to give an opinion as to the caliber of the bullet, I'll object ...." The court asked, "Based upon the comparison of the projectiles? [¶] The objection is noted, overruled."

Dr. Kellerhouse then proceeded to explain that the bullet inside Castillo was lodged about 1.5 inches below the skin. An investigator taped two bullets to Castillo's skin above the location of the lodged bullet. The prosecutor asked Dr. Kellerhouse if he knew the caliber of the taped bullets, but he declined to give a definitive answer, saying, "I'm not an expert in ballistics." He did testify, however, that the X-ray would hardly distort, if it did so at all, the relative sizes of the bullets, so that a comparison of size based on the X-ray would be valid.

On redirect examination, the prosecutor asked Dr. Kellerhouse, "applying ... your expertise [in] the interpretation of X-rays, and considering the

technique that was utilized in this case, do you have an opinion as to whether the projectile within Mr. Castillo ... was of the same size as either of the two that were taped to Mr. Castillo's stomach?" Dr. Kellerhouse responded that "the deformed projectile within the patient most likely represents ... the same caliber as ... the [taped] projectile ... just to the left ... of the projectile within the patient." The investigator then testified that the smaller projectile he taped to the body was a .22-caliber bullet. Apparently that was the bullet that the X-ray showed to be taped immediately to the left of the lodged bullet.

Defendant contends that the foregoing amounted to expert testimony in ballistics, a topic in which Dr. Kellerhouse was not an expert.

The contention is without merit. Dr. Kellerhouse acknowledged that he was not a ballistics expert, and declined to testify about the bullets' caliber. He did testify that both bullets appeared to be the same "caliber," by which he could have meant the same size—defendant did not object or ask the radiologist to clarify his meaning in further examination. As a radiologist, Dr. Kellerhouse could testify that the bullets were located so that their relative size would not be distorted in the X-ray photographs.

Defendant next claims that the court failed to follow the rule of *People v. Kelly* (1976) 17 Cal. 3d 24, regarding the admission of scientific evidence via expert testimony, when it permitted Dr. Kellerhouse to testify about the results of the purported bullet-comparison experiment.

Kelly "set forth certain 'general principles of admissibility' of expert testimony based on new scientific techniques, including the following

'traditional' two-step process: '(1) [T]he reliability of the method must be established, usually by expert testimony, and (2) the witness furnishing such testimony must be properly qualified as an expert to give an opinion on the subject. [Citations.] Additionally, the proponent of the evidence must demonstrate that correct scientific procedures were used in the particular case.' " (*People v. Leahy* (1994) 8 Cal. 4th 587, 594, italics omitted, quoting *People v. Kelly, supra*, 17 Cal. 3d 24, 30, italics omitted.)

But *Kelly* does not apply here. This was not an experiment at all. As we recently stated, "The *Kelly* test is intended to forestall the jury's uncritical acceptance of scientific evidence or technology that is so foreign to everyday experience as to be unusually difficult for laypersons to evaluate." (*People v. Venegas* (1998) 18 Cal. 4th 47, 80.) But here, where "a procedure isolate[d] physical evidence whose existence, appearance, nature, and meaning are obvious to the senses of a layperson, the reliability of the process in producing that result is equally apparent and need not be debated under the standards of *Kelly*." (*People v. Webb* (1993) 6 Cal. 4th 494, 524 [holding that *Kelly* does not apply to a chemical, laser, and photographic process used to expose and identify defendant's fingerprint on duct tape found at the crime scene].) There was no *Kelly* error in presenting the evidence.

Next, defendant asserts in essence that Dr. Kellerhouse conducted a scientific experiment that did not satisfy foundational relevance requirements. One requirement is that "the experiment must have been conducted under substantially similar conditions as those of the actual occurrence ...." (*People v. Bonin* (1989) 47 Cal. 3d 808, 847.)

Setting aside any question whether defendant has waived this claim, we find it to lack merit. The X-ray procedure was not an experiment performed in order to duplicate the conditions of the crime—as stated, it was not an experiment of any kind. Rather, it was simply a procedure that gave the radiologist an opportunity to describe a physical effect of the shooting that the jury could not discern without expert help.

C. Excluding Admission of Evidence of Arming During Prior Crime

The trial court ruled that defendant could not impeach Castillo with an inquiry whether, some 14 years before his testimony, he had been convicted of a felony: possessing narcotics for sale while armed with a .22-caliber pistol. The court allowed defendant to inquire about Castillo's conviction for drug possession for sale, but not about any element of the offense that he was armed. It ruled that evidence of being armed would be substantially more prejudicial than probative under Evidence Code section 352.

Defendant claims that the court erred in excluding the evidence under Evidence Code section 352. In particular, he asserts, knowing about Castillo's prior gun possession might have led the jury to wonder about Castillo's criminal sophistication and whether Castillo's story that defendant and Ronaldo Ayala killed Rositas, Zamora, and Dominguez, was true. He argues that depriving him of the opportunity to raise that question was error. We disagree.

In ruling on the question whether evidence is substantially more prejudicial than probative, the trial court enjoyed broad discretion. (Evid. Code,

§ 352.) "[T]he latitude section 352 allows for exclusion of impeachment evidence in individual cases is broad. The statute empowers courts to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues." (*People v. Wheeler* (1992) 4 Cal. 4th 284, 295.) And the truth-in-evidence provision of the California Constitution (art. I, § 28, subd. (d)), contrary to defendant's claim, did not limit the court's power to exclude the evidence under section 352. The provision itself so provides.

One might conclude, of course, that it would not unduly consume time or confuse the jury to allow defendant to inquire into the arming aspect of Castillo's conviction. But we are required to defer to the trial court's ruling. Given that the conviction was 14 years old and the fact that Castillo was armed would not have revealed any further character trait that would have been particularly telling for impeachment purposes, we are unable to say that the trial court abused its discretion in ruling as it did.[5]

D. Denying Motion for Mistrial

Defendant claims that the trial court committed reversible error under state law when it denied his motion for a mistrial following a witness's reference to Ronaldo Ayala's case.

Juan Manuel Meza testified for the prosecution. He had previously testified at Ronaldo Ayala's trial.

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[5] Defendant also claims that the court's ruling violated the Sixth and Fourteenth Amendments to the United States Constitution and article I, sections 15 and 28, subdivision (d) of the California Constitution. For the reasons explained in the text, we do not agree.

(*People v. Ayala, supra*, 23 Cal. 4th 225, 243-244.) The parties agreed, in a discussion with the court and Meza before Meza's testimony, that Meza would refer to Ronaldo Ayala's trial by a euphemism such as "the 'previous proceedings' or the '1988 proceedings' and that the word 'trial' is not to be utilized."

As Meza was beginning to testify about defendant and Ronaldo Ayala's plan to rob and murder people at the automobile body shop, this exchange occurred between the prosecutor and Meza:

"Q. Did I tell you that we would ask the judge to reconsider your sentencing?

"A. Yes.

"Q. And when was that to have occurred?

"A. When I testified on the case of Ronaldo Ayala."

Defendant objected, but the court overruled the objection, stating, "As to the sequence and [insofar as] it was to be at a hearing, the answer will remain." At the next recess, defendant moved for a mistrial on the basis that Meza "was not to allude to the trial of Ronaldo Ayala," but the court denied the motion.

We review a ruling denying a motion for mistrial for abuse of discretion. (*People v. Welch* (1999) 20 Cal. 4th 701, 749.) We find none. "[A] motion for mistrial should be granted only when ' "a party's chances of receiving a fair trial have been irreparably damaged." ' " (*People v. Ayala, supra*, 23 Cal. 4th 225, 282.) Defendant has not shown that any irreparable damage—indeed, any damage at all—occurred here. Meza's comment was, as the People argue, innocuous. The jury had already been exposed to evidence that Ronaldo Ayala robbed and killed along with

defendant. Indeed, Meza himself testified, without objection, that Ronaldo Ayala said, at a meeting to plan the robbery, that every victim of the robbery was to be bound with duct tape and killed. Finally, the jury was instructed, before beginning to deliberate, that it was not to discuss or consider the legal fate of any perpetrator other than defendant. There was no error.

And for the foregoing reasons, we also reject defendant's argument that the trial court committed reversible error in failing to grant his motion for mistrial because the prosecutor, in his rebuttal argument, referred twice to witnesses' attendance at more than one trial.

THE PENALTY PHASE

FACTS

I. Prosecution's Case

In addition to defendant's prior felony convictions, the prosecution presented evidence of his prior violent criminal activity. In chronological order, the evidence related to the following episodes:

A. Holdup and Hostage-taking at Fast-food Restaurant in 1975

This episode underlay defendant's 1975 felony conviction for burglary. Witnesses testified that on March 28, 1975, he held up the Picnic 'N Chicken fast-food restaurant on Euclid Avenue at Eighth Street in National City. He held a gun to an employee's head while the manager complied with his demand for money. After collecting the money, he announced that he and his hostage, a woman, were departing, but the manager said the cash weighed too much for the hostage to carry and offered to

substitute himself, which defendant allowed. The manager and defendant walked outside, where a police officer shot defendant, allowing the manager to escape unhurt.

B. Stabbing Another Prison Inmate in 1976

Robert Richard Maytorena testified that he shared space in a dormitory at Tehachapi State Prison with defendant. Defendant asked to borrow his radio and Maytorena refused. The two had other disputes. On August 25, 1976, Maytorena awoke to find defendant stabbing him with a screwdriver. He jumped up. Defendant looked startled, as if surprised he had not killed him, and ran away.

Maytorena was taken to the hospital. He testified that he lost his spleen and a kidney and that he was told it was miraculous he had survived. At the time of trial he still suffered flashbacks of the incident, and he had continuing medical problems from the stabbing.

C. Killing Another Prison Inmate in 1982

Witnesses testified that defendant stabbed Jesse (or Jessie) Manuel Apodaca to death on September 6, 1982, in an exercise yard at Folsom State Prison. Daniel Apodaca, Jesse Apodaca's brother, testified that he saw defendant stabbing him multiple times, and he did not see anyone else stabbing him. A pathologist testified that Jesse Apodaca suffered five stab wounds, and died of a stab wound to the heart.

II. Defense Case

Defendant did not testify at the penalty phase, but various relatives testified about his background, along the lines of the testimony given in *People v. Ayala*, *supra*, 23 Cal. 4th 225, 296-297. In addition,

Marjorie Suarez, defendant's half sister, testified that their mother, Rosa Ayala, was and remained an alcoholic, and that she was not affectionate or demonstrative. She explained that many of Rosa Ayala's children had encountered misfortune: some were in prison and one had died of a heroin overdose. She begged the jury to spare defendant's life.

Rosa Ayala testified that defendant has four children and is married. She testified that he was respectful of his parents as a child.

Jose R. Ayala, defendant's father, testified with the aid of an interpreter.[6] When defendant was about 12 to 14 years old, his half brother Ernie almost died of a heroin overdose. Jose Ayala had to break down the bathroom door to rescue him. He told the jury that he wanted defendant to be punished, not by death, but "in jail, so that his children would see him."

Barbara Moreno, defendant's sister, testified that as an adult, defendant, who lived across the street, would help take care of her children when needed. She further testified that defendant was a warm parent and husband, despite a difficult home life; their father was once jailed for domestic violence.

Defendant's half sister, Esther Brosnan, testified that Rosa Ayala "[n]ever grew up" and should not have had eight children.

Defendant introduced evidence to suggest that Ronaldo Ayala was the ringleader of the crimes at the body shop. Various witnesses testified that Ronaldo Ayala was the leader of the two brothers and

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[6] In *People v. Ayala*, *supra*, 23 Cal. 4th 225, 296, defendant's father is identified as Rogelio "Joe" Ayala.

that defendant was under his influence.

The defense also presented evidence to cast doubt on defendant's role in the prison assaults, particularly the killing of Jesse Apodaca. It called two witnesses, Guadelupe Navarro and Jorge Ramirez Acosta, also then incarcerated at Folsom, who controverted other accounts of the stabbing. Both testified that immediately afterward prison guards lined up several inmates against the wall, but defendant was not among them—he was nearby, but not in the immediate vicinity of the mortally wounded inmate. By contrast, other witnesses, including the guard involved, had testified that a guard grabbed defendant while he was still stabbing and kicking Apodaca, or immediately afterward, and placed him under arrest against the wall.

The prosecution impeached Navarro with evidence that he had told investigators he did not want to gain a reputation as a "rat" by testifying against another inmate. And Daniel Apodaca, called as a rebuttal witness, testified that neither Navarro nor Acosta was in the exercise yard when his brother was killed.

There had been testimony that the inmate who stabbed Apodaca did so using his right arm, and the defense used it to its advantage. James Grisolia, M.D., a clinical neurologist, testified regarding the weakness of defendant's right arm and shoulder that stemmed from being shot during the 1975 Picnic 'N Chicken robbery. Dr. Grisolia explained that defendant had fairly good mobility in his right arm, but that the arm and his right hand were weak, as were the muscles that elevate the arm and wrist. His condition would have been worse in the past, and Dr. Grisolia doubted that he would have been able to

penetrate a victim's rib with a knife held in his right hand and inflicted a wound in the heart. But he noted that defendant was left-handed, and acknowledged that his left hand would be able to inflict a knife wound to the heart.

The defense also presented evidence to the jury that defendant had never been charged with Apodaca's killing, or in any other prison assault. A former parole officer testified that the authorities' policy is to prosecute in-prison crimes if there is sufficient evidence to do so. And there was testimony that defendant and Apodaca had reconciled, following an exchange of insulting remarks, when Apodaca apologized.

ISSUES ON APPEAL

Defendant presents a number of legal arguments related to the penalty phase proceedings. As will appear, none has merit.

A. Prosecutor's Appointment to Municipal Court Bench

Following the close of the guilt phase, the parties discussed whether to tell the jury that the lead prosecutor, Woodward, had just been appointed to the San Diego Municipal Court and would no longer appear for the People. The trial court was inclined to inform the jury of the fact. Defendant urged that the court instead limit itself to saying Woodward had departed for positive professional reasons. To do otherwise, he argued, would be to burnish the prosecution's stature before the jury and improperly enhance the possibility of a verdict of death.

The trial court, stating that Woodward's appointment was public knowledge, disagreed. It said

that it did not wish to lose credibility with the jurors, in essence by giving them a vague and unsatisfying explanation for Woodward's absence, and informed them that Woodward had departed for an appointment to the bench, a process that had been underway before the prosecution of defendant.

Defendant renews his argument here. He claims that informing the jury of Woodward's elevation to the bench enhanced the prosecution's stature, depriving him of a trial before an impartial judge because the trial court now appeared to be the prosecutor's colleague, and violating his constitutional right to due process of law generally.

We reject defendant's claim. It is purely speculative. Nothing in the record shows that the jury was influenced in any way by Woodward's appointment. The same applies to defendant's argument that the trial court now appeared to the jury to be on the side of the prosecution. We also note that the prosecutor's departure was, so to speak, a clean break. Although the jury knew that the People were seeking the death penalty, the jurors had not yet heard the prosecution's case that defendant should be executed. The jury had already returned its verdict of guilt, and that verdict could not have been influenced by Woodward's appointment.

B. Prosecutor's Remark About Taking Case Seriously

At closing argument, the prosecutor urged that defendant be sentenced to death, meriting nothing less, and said that she did not ask for the death penalty "lightly." Defendant asked the court to assign misconduct to the remark because it amounted to a personal endorsement of the need for the verdict, but

the court ruled that the prosecutor's comment was proper and denied the motion.

On appeal, defendant claims that the ruling violated his rights under the Eighth and Fourteenth Amendments to the United States Constitution and article I, section 17 of the California Constitution. He also contends that it contravened state law beyond the constitutional guaranty, and indeed his constitutional claims are predicated on state law error.

"When we review a claim of prosecutorial remarks constituting misconduct, we examine whether there is a reasonable likelihood that the jury would have understood the remark to cause the mischief complained of." (*People v. Osband* (1996) 13 Cal. 4th 622, 689.)

"[A] prosecutor may not ... vouch personally for the appropriateness of the verdict he or she urges." (*People v. Benson* (1990) 52 Cal. 3d 754, 795.) But there is no reasonable likelihood that the jury would have understood the prosecutor's remark as doing so. She was stating "what was obvious and altogether unobjectionable—i.e., that it was the People's position that defendant's crimes called for the ultimate sanction." (*Ibid.*) By declaring that she did not take that position lightly, she was saying that it was the People's considered position, and not whimsical. (*People v. Scott* (1997) 15 Cal. 4th 1188, 1219.) But that was stating the obvious. We discern no misconduct. Because there was no violation of defendant's state law rights, and his constitutional claims are predicated on his state law claim, we reject them as well.

C. Failing to Instruct Not to Double-count Aggravating Factors

It will be recalled that the jury convicted defendant of three murders and found true a special circumstance of multiple murder. It also convicted him of two attempted robberies and found true a special circumstance of felony-murder attempted robbery. Defendant claims that the court violated the Eighth and Fourteenth Amendments to the United States Constitution in refusing to give this instruction, which he requested, to the jury before it decided the penalty: "You must not consider as an aggravating factor the existence of any special circumstance if you have already considered the facts of the special circumstance as a circumstance of the crime for which the defendant has been convicted. [¶] In other words, do not consider the same factors more than once in determining the presence of aggravating factors."

Instead, the court instructed the jury thus: "In determining which penalty is to be imposed on defendant, you shall consider all of the evidence which has been received during any part of the trial of this case .... You shall consider, take into account and be guided by the following factors, if you find them to be applicable in this case: [¶] (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true." This was, in substance, the standard language of part of CALJIC No. 8.85 (5th ed. 1988).

In *People v. Melton* (1988) 44 Cal. 3d 713, we stated, "The literal language of [factor] (a) presents a theoretical problem ... since it tells the penalty jury to consider the 'circumstances' of the capital crime

and any attendant statutory 'special circumstances.' Since the latter are a subset of the former, a jury given no clarifying instructions might conceivably double-count any 'circumstances' which were also 'special circumstances.' On defendant's request, the trial court should admonish the jury not to do so. [P] *However, the possibility of actual prejudice seems remote ....*" (*Id.* at p. 768, second italics added.)

"When reviewing a supposedly ambiguous [i.e., potentially misleading] jury instruction, ' "we inquire 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." ' " (*People v. Welch*, *supra*, 20 Cal. 4th 701, 766.)

We discern no such reasonable likelihood here. "[W]e have already concluded that the standard instructions do not inherently encourage the double counting of aggravating factors. [Citations.] We have also recognized repeatedly that the absence of an instruction cautioning against double counting does not warrant reversal in the absence of any misleading argument by the prosecutor." (*People v. Barnett* (1998) 17 Cal. 4th 1044, 1180.) There was no misleading argument here.

The prosecutor's closing argument separated the murders and other crimes at the body shop as circumstances of the crime under section 190.3, factor (a) from the evidence of defendant's other prior misconduct, informing the jurors that they were not to consider the circumstances of the crimes both under section 190.3, factor (a), and as prior violent criminal activity (*id.*, factor (b)) or as prior felony convictions (*id.*, factor (c)). Pointing to information presented in chart form, she said, "The boards that are in yellow represent [defendant's] felony

convictions. The boards that are in red represent his violent acts, and the board that is in purple represents the underlying crimes in the body shop." In sum, she said nothing that might mislead the jury as defendant suggests. (See *People v. Barnett*, *supra*, 17 Cal. 4th 1044, 1179.) As stated, this record gives no indication of a reasonable likelihood that the jury applied the instructions given it in a legally improper manner.

D. Other Claims

Defendant claims that the 1978 death penalty scheme is unconstitutional in various respects—for example, in permitting the prosecution to introduce evidence of his prior violent criminal activity at the penalty phase. But as a " ' "general matter at least, the 1978 death penalty law is facially valid under the federal and state charters.... We see no need to rehearse or revisit our holdings or their underlying reasoning." ' " (*People v. Ochoa* (1998) 19 Cal. 4th 353, 478.) We will, however, touch on defendant's key arguments. Jury unanimity is not required to establish the truth of unadjudicated crimes. (*People v. Carpenter*, *supra*, 21 Cal. 4th 1016, 1061.) Defendant was not entitled to a separate jury for the penalty phase. (*People v. Pride*, *supra*, 3 Cal. 4th 195, 252.) The delay in presenting evidence of unadjudicated crimes did not amount to a stale prosecution (*People v. Ayala*, *supra*, 23 Cal. 4th 225, 300) or violate any statute of limitations (*People v. Carpenter*, *supra*, 21 Cal. 4th at p. 1061). The argument that each California county improperly applies its own standards to death penalty prosecutions is without merit. (*People v. Holt* (1997) 15 Cal. 4th 619, 702; see also *People v. Ochoa*, *supra*, 19 Cal. 4th at p. 479.) And the combination of

numerous available special circumstances and the prosecution's charging discretion does not render the death penalty law invalid. (See *People v. Lucas* (1995) 12 Cal. 4th 415, 478.)

DISPOSITION

The judgment is affirmed.

Mosk, J.

Baxter, J., Werdegar, J., Chin, J., and Brown, J., concurred.

DISSENT

GEORGE, C. J., Dissenting.

I agree with the majority's conclusion that the ex parte procedure employed by the trial court to review defendant's challenge to the prosecution's use of peremptory challenges under *People v. Wheeler* (1978) 22 Cal. 3d 258, 276-277 (*Wheeler*) and *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*) was error, but I disagree with its unprecedented conclusion that the erroneous exclusion of the defense from a crucial portion of jury selection proceedings may be deemed harmless. I believe that applicable state and federal precedent clearly requires that we reverse defendant's conviction and remand this case for a new trial.

I.

During voir dire, defendant's counsel made three separate *Wheeler/Batson* motions, based upon the prosecution's challenges to seven potential jurors who were members of a racial or ethnic minority. The trial court was uncertain whether the first two motions (concerning two jurors each) stated a prima facie case, but in an abundance of caution it asked

the prosecution to respond with reasons for those challenges, and it held hearings on those motions. The trial court expressly found that the third defense motion (concerning three jurors) stated a prima facie case, asked the prosecution to respond, and held a hearing on that motion as well.

In response to the first motion, the prosecution stated: "I can do that [i.e., provide reasons for the peremptory challenges], but I would do it in chambers, without the presence of counsel ... [¶] They are not entitled to our strategy." In reply, defense counsel stated: "*But I think I ... am entitled to be present with respect to their statement, to the extent that their arguments — that their statement is a misstatement of the facts, and I think I'm entitled to at least make sure the record is clear as to what the statement of facts is.*" (Italics added.) Defense counsel immediately added: "With respect to strategy, I certainly don't want to pry into the strategy." The court thereafter allowed the prosecutor to state his reasons at all three hearings in camera, outside the presence of defendant and his counsel, with the proceedings reported but the record sealed.[1]

II.

I first explain why I agree with the majority that the trial court erred by conducting the *Wheeler/Batson* hearing outside the presence of

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[1] In response to the third motion, the court stated that it would "request further clarification from the People." The prosecutor responded, "Would the court do that in private, or are we requiring it for counsel?" The court replied, "It will be a matter of record. It will happen in private." Defense counsel asked, "Does the court wish us to leave the courtroom?" The court replied, "Yes."

defendant and his counsel. Under the procedure established in *Wheeler* and *Batson*, once a defendant presents a prima facie case that the prosecution has employed peremptory challenges in a racially discriminatory manner, the prosecution is provided with an opportunity to explain or rebut that showing. *But the burden of persuasion on this issue still, and always, remains with the defendant.* This has long been the operating assumption under both *Wheeler* and *Batson*. (See, e.g., *Purkett v. Elem* (1995) 514 U.S. 765, 768 ["the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike"].) Seen in this light, it becomes clear why a defendant must have the right to be present with counsel and to participate in the proceeding when the prosecution undertakes its rebuttal. *The defendant's obligation to persuade the court continues even after the prosecution has made its statement,* and accordingly, a clear majority of decisions has recognized that a defendant must have the right to be present with counsel in order to comment on, and possibly offer surrebuttal to, the prosecution's representations. (See, e.g., *U.S. v. Thompson* (9th Cir. 1987) 827 F.2d 1254, 1258-1259 (*Thompson*); *U.S. v. Roan Eagle* (8th Cir. 1989) 867 F.2d 436, 441; *U.S. v. Gordon* (11th Cir. 1987) 817 F.2d 1538, 1541, vacated and remanded on another point (1988) 836 F.2d 1312; *Ex Parte Branch* (Ala. 1987) 526 So.2d 609, 624; *Gray v. State* (1989) 562 A.2d 1278, 1282-1283; *Com. v. Futch* (1995) 647 N.E.2d 59, 61-62; *Harper v. State* (Miss. 1987) 510 So.2d 530, 532; *State v. Antwine* (Mo. 1987) 743 S.W.2d 51, 63-64; *People v. Hameed* (1996) 666 N.E.2d 1339, 1342; *Buck v. Com.* (1994) 443 S.E.2d 414, 415; see also Note, *Defense Presence And Participation: A Procedural Minimum for Batson v.*

Kentucky Hearings (1989) 99 Yale L.J. 187.)[2]

As Judge Kozinski observed for the court in *Thompson, supra*, 827 F.2d 1254, defense counsel serves two crucial functions when the prosecution states its reasons at a *Wheeler/Batson* hearing. First, the presence of the defendant and his or her counsel may assist the court in probing the prosecution's stated reasons and uncovering pretextual justifications — for example, counsel might be able to point out that other nonexcluded jurors had the same attribute put forth as a reason for excluding the subject juror. (*Thompson, supra*, 827 F.2d at p. 1260.) In the same vein, defense counsel also might be able to argue that reasons advanced by the prosecution are legally improper. (*Ibid.*) The court in *Thompson* observed that the trial judge "might be able to detect some of these deficiencies by himself, but that is not his normal role under our system of justice. He would have to take on the role of defense counsel — inventing possible arguments as to why the prosecutor's stated reasons might not be sufficient —

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[2] Decisions from the Sixth and Seventh Circuits of the United States Courts of Appeals, reflecting the minority view, generally have permitted the use of ex parte hearings in this context, and have left to the court's discretion whether to include the defendant's counsel in that procedure. (*United States v. Davis* (6th Cir. 1987) 809 F.2d 1194, 1201; *U.S. v. Tucker* (7th Cir. 1988) 836 F.2d 334, 340.) Even so, the court in *Tucker* expressed a preference for holding adversarial, rather than ex parte, hearings in this context, "whenever possible." (*Tucker*, at p. 340.) By contrast, another minority group of cases—actually a subset of the majority rule—requires an evidentiary hearing after a prima facie case of group bias has been established. (E.g., *State v. Green* (N.C. 1989) 376 S.E.2d 727, 728; *Goode v. Shoukfeh* (Tex. 1997) 943 S.W.2d 441, 452] [civil case, stating the general rule].)

while at the same time keeping an open mind so as to rule on the motion impartially." (*Ibid.*) And there may be valid arguments that a trial court will overlook unless assisted by an able, interested defense counsel. (*Id.*, at pp. 1260-1261.) Finally, "[a]t least as to some matters, the court simply might not have the time to ferret out the facts."[3] (See *id.*, at p. 1260, fn. 4.)

Second, as the court observed in *Thompson, supra,* 827 F.2d 1254, defense counsel performs another important function at a *Wheeler/Batson* hearing: preserving "for the record, and possible appeal, crucial facts bearing on the judge's decision." (*Thompson, supra,* 827 F.2d at p. 1261.) The court in *Thompson* stated: "This is a case in point. All we have before us concerning this issue is the prosecutor's explanation of her reasons and the district judge's ruling. For all we know, however, every one of the jurors picked might have worn jeans or voted to acquit a prior defendant [(these were among the prosecution's reasons for challenges)]. Our trust in the learned district judge does, of course, make us quite certain that this could not have been the case. *However, if we are to review the district judge's decision, we cannot affirm simply because we are confident he must have known what he was doing. We can only serve our function when the record is clear as to the relevant facts, or when defense counsel fails to point out any such facts after learning of the*

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[3] For example, if the prosecution stated that it challenged a juror because the juror was a neighbor of or lived near the defendant, a trial judge unfamiliar with the juror's neighborhood might not be able to determine whether this was so, but defense counsel (possibly assisted by the defendant) might be able to shed light upon the matter.

prosecutor's reasons. [¶] Here, the record's silence cannot be reassuring.... Since defense counsel did not learn of the prosecutor's reason until long after the trial, the fact that he failed to point out any discrepancies cannot give us the confidence we would normally have when the record is mute. [¶] In short, we respectfully disagree with the view that defense counsel has nothing to add once he has pointed out the potential *Batson* violation .... *Defense counsel could say things that might persuade the district judge or, failing that, he could say things that might persuade us. Both functions are crucial to our adversary system and to the principles of due process it serves.*" (*Ibid.*, italics added.)

Under *Thompson* and its progeny — including today's decision — a defendant has a right to be present and have his or her counsel orally rebut the prosecution's justifications unless it is shown that an ex parte procedure is necessary in order to protect some overriding interest that favors the maintenance of secrecy and the exclusion of the defendant (and counsel) as well as the public. We recently described some categories of such overriding interests in the related context of a defendant's Sixth Amendment right to a public and open trial, and the public's First Amendment right of access to criminal and civil trials. (See generally *NBC Subsidiary (KNBC-TV) v. Superior Court* (1999) 20 Cal. 4th 1178, 1205 (*NBC*) [defendant's Sixth Amendment right to public trial]; *id.*, *passim* [public's First Amendment right of access to all significant parts of criminal and civil trials].)[4]

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[4] In the present matter, defendant has not asserted that the ex parte and in camera procedure employed below violated his Sixth Amendment right to a public trial. The voir dire process has been recognized as being among the proceedings to

(continued...)

For example, under appropriate circumstances, matters involving national security, a confidential informant, or an undercover investigation, may be revealed in camera and be kept from the public (see *NBC, supra*, 20 Cal. 4th at p. 1222, fn. 46), and, as the majority observes, the Ninth Circuit Court of Appeals in *Thompson* equated with such matters the prosecution's interest in keeping confidential certain aspects of tactics and strategy. (*Thompson, supra*, 827 F.2d at p. 1259.) But the court held in *Thompson* that on the facts presented in that case (as demonstrated by the ex parte, in camera sealed record) the prosecution's *Batson* justifications were merely routine (they consisted of "the potential jurors' profession, attitude, dress, address and the fact that one had acquitted in a prior case"). (*Thompson*, at p. 1259.) This, concluded the Ninth Circuit, did not amount to protectable strategy or tactics. (*Ibid.*) The majority here properly concludes likewise (maj. opn., *ante*, at pp. 261-262): the

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(...continued)
which the right to a public trial and public access rights apply. (E.g., *Press-Enterprise Co. v. Superior Court of Cal.* (1984) 464 U.S. 501 [First Amendment context, criminal case voir dire].) And under *both* the Sixth and First Amendments, a trial court is not permitted to close a trial proceeding unless the court first "provides notice to the public on the question of closure and after a hearing finds that (i) there exists an overriding interest supporting closure; (ii) there is a substantial probability that the interest will be prejudiced absent closure; (iii) the proposed closure is narrowly tailored to serve that overriding interest; and (iv) there is no less restrictive means of achieving that overriding interest." (*NBC, supra*, 20 Cal. 4th at p. 1181; see also *id.*, at p. 1205 [same rules apply in First Amendment and Sixth Amendment contexts].) There is no indication that the trial court considered any of these factors in the present case, or that it made any such finding.

prosecutor's stated reasons for exercising peremptory challenges did not implicate or reveal trial strategy. Accordingly, *assuming* for the purpose of analysis that the protection of confidential strategy may serve as an overriding interest that will justify the holding of ex parte, in camera hearings in this context, the facts here presented do not implicate any such interest and hence no adequate justification existed for excluding defendant and his counsel from the *Wheeler/Batson* hearing.[5] The trial court erred by proceeding ex parte.

III.

The majority finds error under state law, and assumes for the purpose of analysis that the exclusion of a defendant and defense counsel from a *Wheeler/Batson* hearing also offends the federal Constitution. (Maj. opn., *ante*, at p. 264.) Yet the majority concludes that, on the facts of this case, the erroneous exclusion of defendant and his counsel from the jury selection hearing was harmless under state law (*People v. Watson* (1956) 46 Cal. 2d 818, 836 (*Watson*)) and under the stricter federal constitutional harmless error standard of *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*). (Maj. opn., *ante*, at p. 264.)

First, the majority's application of the test for harmless error is suspect. Although the majority (*ante*, at p. 269) cites analogous cases which in turn

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[5] Because the majority agrees that on these facts the prosecution's stated reasons for the exercise of peremptory challenges did not implicate trial strategy, the majority's suggestion that the need to protect trial strategy may constitute an overriding interest that may justify ex parte or in camera proceedings is dictum.

stress that (i) "*prejudice will be presumed*" if the "denial of counsel at the critical stage of a criminal proceeding[] ... may have affected the substantial rights of the accused" and that (ii) "[*o*]*nly the most compelling showing to the contrary will overcome the presumption*" (*People v. Knighten* (1980) 105 Cal. App. 3d 128, 132-133 (*Knighten*))[6] —and although the majority apparently concedes, as it must, that the denial of counsel here *may have* affected defendant's substantial rights (maj. opn., *ante*, at pp. 267-268)— nothing in the language, approach, tone, or structure of the majority opinion suggests that the majority's harmless error analysis has been undertaken with these two crucial *Knighten* principles in mind.

In any event, even if the majority properly were to expressly acknowledge and apply a presumption of prejudice in this case, the majority would be unable to properly rely upon the record made below to reach

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[6] Accord, *People v. Hogan* (1982) 31 Cal. 3d 815, 849-850 (*Hogan*) (lead opn. of Bird, C. J.) (quoting and applying the same standard, and finding reversible error); see also *People v. Lozano* (1987) 192 Cal. App. 3d 618, 624-626 (same); *People v. Dagnino* (1978) 80 Cal. App. 3d 981, 989 (same). In *Dagnino, supra*, the court, after quoting from *Glasser v. United States* (1942) 315 U.S. 60, 76, and *Mempa v. Rhay* (1967) 389 U.S. 128, 134, explained: "[W]hile denial of counsel at the 'critical stage' of a criminal proceeding is not necessarily prejudicial as a matter of law, prejudice will be presumed where the denial '*may have affected*' the substantial rights of the accused. Only the 'most compelling showing' to the contrary will suffice to overcome the presumption, and courts will not engage in 'nice calculations' in making such a determination. And of course the foundational constitutional requirement, in determining the harmlessness of such error, is *Chapman v. California*'s mandate that the 'court must be able to declare a belief that [the denial of counsel] was harmless beyond a reasonable doubt.'" (*People v. Dagnino, supra*, 80 Cal. App. 3d at p. 989, italics in original.)

a reliable decision on the *Wheeler/Batson* issue. The record on this issue is incomplete, having been erroneously constructed with the input of only the prosecution and the court, and without crucial and necessary participation by defendant and his counsel. The court in *Thompson, supra*, 827 F.2d 1254, addressing this same issue, explained that we cannot credit the prosecutor's explanations for the challenges (and the court's rulings thereon), because "*the very reason we hold the procedure to have been deficient is that, without defense counsel's participation, the transcript is likely to be incomplete or misleading, as it is in this case. The government cannot rely on a transcript reflecting such fundamentally flawed procedures to show that that defendant suffered no prejudice.*" (*Id.*, at p. 1261, italics added.)

The method by which the majority proposes to find no prejudice here — reviewing the transcripts of the ex parte hearings in support of its conclusion that the prosecutor's stated reasons amply justified the peremptory challenges — is precisely the form of analysis rejected in *Thompson, supra*, 827 F.2d 1254, and its progeny. (Accord, *U.S. v. Alcantar* (9th Cir. 1990) 897 F.2d 436 (*Alcantar*) [revg. conviction pursuant to *Thompson*].) It is difficult to imagine how the majority could reach its conclusions that the record is "well developed," and that "defense counsel could not have argued anything substantial that would have changed the court's rulings" (maj. opn., *ante*, at p. 268), while faithfully approaching the error by *presuming* prejudice and by recognizing that "[o]*nly the most compelling showing to the contrary will overcome the presumption*" of prejudice. (*Knighten, supra*, 105 Cal. App. 3d 128, 133.)

The court concluded in *Thompson* that the erroneous exclusion of the defendant and his counsel from the hearing, and the resulting deficient record, produced a defect in the trial that rendered the record inadequate for purposes of appellate review. (*Thompson, supra,* 827 F.2d at p. 1261, fn. 5 [contrasting such error with trial errors that are subject to harmless error analysis].) The court in *Thompson* did not immediately reverse, however. Instead, it remanded "for a hearing ... on the prosecution's motive in exercising its peremptory challenges. If the district court finds that the passage of time has rendered such a hearing meaningless, it shall vacate defendant's convictions and schedule a new trial." (*Thompson, supra,* 827 F.2d at p. 1262.)

Assuming the general propriety of such an after-the-fact hearing on remand, that approach is unavailable to us here, because even if the trial judge,[7] the prosecutor, and defense counsel can be located now, it would be fanciful to expect those persons—*11 years after the event*—to be able meaningfully to reconstruct the record of the seven *Wheeler/Batson* motions here at issue. Facing a similar problem in *People v. Hall* (1983) 35 Cal. 3d 161, we observed that "[t]he proceedings were conducted more than three years ago. It is unrealistic to believe that the prosecutor could now recall in greater detail his reasons for the exercise of the peremptory challenges in issue, or that the trial judge could assess those reasons, as required, which would demand that he recall the circumstances of the case, and the manner in which the prosecutor

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[7] The trial judge now serves as a member of the federal judiciary.

examined the venire and exercised his other challenges." (*Id.*, at p. 171; see also *People v. Snow* (1987) 44 Cal. 3d 216, 227 [relying upon *Hall, supra*, and declining to remand six years after the event].)[8] Further, a remand also would be impracticable and inadequate in this case because the extensive written juror questionnaires of the vast majority of panelists who participated in the general voir dire have been lost and apparently destroyed. Thus, as a result of the trial court's error, we are left with a record that is inadequate for our review and that cannot be reconstructed at this time. Accordingly, a reversal of the conviction and a remand for a new trial is the only appropriate remedy.

The majority purports to distinguish this case from *Thompson, supra*, 827 F.2d 1254, by observing that here, during the three ex parte hearings, the prosecution offered various justifications for challenges to the seven jurors, and in all seven instances the trial court stated on the record that it agreed with the prosecution's position (although in a

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[8] The futility of a remand here is additionally demonstrated by *Alcantar, supra*, 897 F.2d 436. There, the court remanded for an after-the-fact hearing only two years after erroneous ex parte *Batson* proceedings. On remand, the trial court reported that "[t]here [is] simply no way in this case, given the two-year delay before the hearing, for the court and the parties to reconstruct the circumstances as they existed at the time of trial." (*Id.*, at p. 439.) Nonetheless, the trial court purported to affirm its prior decision that the peremptory challenges were proper, and declined to order a new trial. On appeal from the remand, the Ninth Circuit reversed, holding that the hearing held two years after the jury selection and trial did not provide a "meaningful process for testing whether the prosecutor's reasons for striking the [minority] jurors were racially neutral." (*Id.*, at p. 438.)

few instances it rejected some of the prosecution's reasoning). Accordingly, the majority asserts that the present case, unlike *Thompson*, presents a situation in which the reviewing court has the benefit of the trial court's remarks assessing the prosecutor's reasons for the challenges, and that this in turn allegedly provides us with a "*well-developed*" record. (Maj. opn., *ante*, at p. 268, italics added.)

The majority fails in its attempt to distinguish *Thompson*. As noted above, the court in that case explained in detail why it would be improper to conclude that a trial judge in this situation can fill in the gaps and create an adequate (much less a well-developed) record. (See *Thompson, supra*, 827 F.2d at pp. 1260-1261.) As defendant asserts, "[i]t is unrealistic to expect that a judge in the midst of trial will be able to pick out the discrepancies in a prosecutor's justifications, especially where, as here, 70 panelists, whose questionnaires alone covered 77 questions ..., participated in the general voir dire." Contrary to the majority's view and as *Thompson* itself shows, the circumstance that the trial court made a few comments on the record does not support a determination that the erroneous ex parte procedure was harmless beyond a reasonable doubt.[9]

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[9] The majority also attempts to distinguish *Thompson* by observing that there, unlike the present case, the prosecutor once mentioned race when articulating her reasons for one of the challenges. (Maj. opn., *ante*, at p. 268.) This observation is accurate, but irrelevant to the issue we consider here. The court in *Thompson* mentioned the cited circumstance in the course of illustrating the necessity for defense counsel to be present in order to be able to probe the prosecutor's reasons and create an adequate record (*Thompson, supra*, 827 F.2d at p. 1260), and as noted above, the court in *Thompson* found reversible error because the trial court erroneously held an ex parte hearing—

(continued...)

The irony and fallacy of the majority's approach is apparent. While eschewing the prospect of reversal based upon defendant's "speculation regarding theoretical possibilities" (maj. opn., *ante*, at p. 267) that a properly created record might have presented a different picture "that would have changed the court's rulings" (maj. opn., *ante*, at p. 268), the majority is quite willing to *assume* that the record is "well developed" (*ibid.*) and substantially as it would have been had defendant and his counsel not been erroneously excluded from the hearings. I agree with the federal circuit court's assessment in *Thompson*: we simply cannot credit this record, and an appellate court cannot serve its review function when it cannot be satisfied that the record is complete as to the relevant facts. (*Thompson, supra*, 827 F.2d at p. 1261.)

IV

Defendant asserts in related contentions that the ex parte procedure violated his state and federal constitutional rights to be present and to be represented by counsel. The majority relegates these substantial claims to a cursory paragraph in which it appears to concede the existence of the errors, but concludes that they were harmless beyond a reasonable doubt for the same reasons set forth earlier in its opinion. (Maj. opn., *ante*, at pp. 268-269,

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(...continued)
and not because the prosecution's challenges were themselves improper. Here as well, we focus upon the adequacy of the record in light of the erroneous ex parte procedure. The circumstance that the prosecutor in the present case did not mention race as a reason for any challenge has no bearing on the question of the adequacy of the record for purposes of appellate review.

citing *Rushen v. Spain* (1983) 464 U.S. 114, 118-119 (*per curiam*); *People v. Wright* (1990) 52 Cal. 3d 367, 402-403; *People v. Hogan, supra,* 31 Cal. 3d 815, 849-850; and *People v. Knighten, supra,* 105 Cal. App. 3d 128, 132-133.) The four cases relied upon by the majority, however, are inapposite: none concerned a situation, like this one, in which the erroneous absence of a defendant and his or her counsel *created an incomplete record* of a critical and contested trial hearing, and hence the cases do not stand for the proposition that a defect such as we address here can be found harmless beyond a reasonable doubt.

In any event, the majority again fails to acknowledge, much less abide by, the law set out in the cases upon which it relies. As noted above, the majority's cited cases stress that error such as this, if properly subjected to harmless error analysis, is *presumed* to be prejudicial, and "[o]*nly the most compelling showing to the contrary will overcome the presumption.*" (*Knighten, supra,* 105 Cal. App. 3d 128, 133, italics added.) In *Knighten, supra,* 105 Cal. App. 3d 128, a compelling showing did overcome the presumption of prejudice: defense counsel, who had been excluded erroneously from an initial exchange between the court and the jury, immediately thereafter participated in further open court proceedings during which counsel's "suggestions and objections were carefully heeded" (*id.*, at p. 134), thereby eliminating any possibility of prejudice. By contrast, in *People v. Hogan, supra,* 31 Cal. 3d 815, 850, a similar error resulted in the jury's receiving inadmissible and prejudicial information concerning the defendant's reluctance to undergo a polygraph examination, and hence no compelling showing necessary to overcome the presumption of prejudice could be made. Once again, the majority provides no

indication that it has approached the question of harmless error with the traditional *Knighten* principles in mind.

V

The majority exhorts this dissenting opinion to "come to grips with the record's strong factual base for our conclusion that the error was harmless." (Maj. opn., *ante*, at p. 266, fn. 3.) As I have observed (and as the Ninth Circuit noted under the same circumstances in *Thompson, supra*, 827 F.2d 1254, 1261), the record here is irremediably incomplete; any perceived strength is illusory and cannot be relied upon.[10]

Neither the majority nor any of the briefs cites *any* appellate decision that has found harmless the erroneous exclusion of the defense from a crucial portion of jury selection proceedings, and my own research similarly has not uncovered any such ruling. Today's opinion carries the dubious distinction of being the first such decision. Because I

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[10] The majority's assessment of the strength of the record is erroneous in yet another respect. The majority asserts that we can have confidence in the record because the trial judge below showed himself to be "diligent, prepared, knowledgeable, and engaged" in the *Wheeler* proceedings in both this case and in another recently decided matter. (Maj. opn., *ante*, at p. 268.) As the Ninth Circuit explained in *Thompson supra*, 827 F.2d 1254, "[o]ur trust in the learned [trial] judge" does not permit us to draw the inference adopted by the majority: "*If we are to review the [trial] judge's decision, we cannot affirm simply because we are confident he must have known what he was doing. We can only serve our function when the record is clear as to the relevant facts, or when defense counsel [is present at the Wheeler/Batson hearing and] fails to point out any such facts after learning of the prosecutor's reasons.*" (*Id.*, at p. 1261, italics added.)

find the majority's reasoning unpersuasive and inconsistent with established law, I dissent.

George, C.J.

Kennard, J., concurred.

OPPOSITION BRIEF

No. 13-1428

In the Supreme Court of the United States

KEVIN CHAPPELL, WARDEN,

Petitioner,

v.

HECTOR AYALA,

Respondent.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Whether a state court's finding that federal error was harmless beyond a reasonable doubt is to be reviewed under the *Brecht* standard.

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STATEMENT OF THE CASE

1. Trial

In 1989, Respondent, Hector Ayala ("Ayala") was tried for the murder of three men, which occurred in 1985. *See* PA 2a-3a.[1] Jury selection began with over 200 potential jurors, each of whom had survived hardship screening and completed a 77-question, 17-page questionnaire. PA 3a. Using these juror questionnaires, it took the parties over three months to select a jury of twelve. *Id.* During jury selection, each side was allotted 20 peremptory challenges. *Id.* Of these 20 challenges, the prosecution used 18. *Id.* Seven of the prosecution's 18 challenges were used to strike each prospective juror available for challenge, who was of black or Hispanic descent. *Id.* As a result of these 7 strikes by the prosecution, the jury was devoid of any black and Hispanic members. *Id.* In response, Ayala, who is Hispanic, brought three separate motions[2] pursuant to *People v. Wheeler*, 22 Cal.3d 258 (1978) – California's equivalent to *Batson v. Kentucky*, 476 U.S. 79 (1986) – claiming that the prosecution was systematically excluding minority jurors on the basis of race. PA 3a-4a & n.1.

Upon the first *Batson* motion, the court required the prosecution to state its reasons for challenging the jurors in question, and the prosecutor responded that he did not want to reveal his strategy. PA 4a, 196a-197a. Over the defense's

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[1] "PA" refers to the appendix filed with the petition for writ of certiorari.

[2] These motions are referred to as the *Batson* motions.

objections, the court then held a private hearing with the prosecution, outside the presence of Ayala and his lawyer, at which the prosecutor stated his reasons for the peremptory challenge. PA 4a. Upon the second and third *Batson* motions, the trial court continued to employ this ex parte, *in camera* procedure to hear and consider the prosecutor's purported reasons for challenging prospective minority jurors. *Id.* The court did so despite finding, by the third *Batson* motion, that the defense had established a prima facie showing of racial discrimination. *Id.* The court denied all three *Batson* motions, ruling that the prosecution had race-neutral reasons for striking each of the seven minority jurors. PA 4a.

Ayala was convicted on three counts of murder, one count of attempted murder, one count of robbery and two counts of attempted robbery. PA 2a, 5a. Ayala subsequently received a death sentence. PA 190a.

During the jury selection process, the court collected all of the juror questionnaires. PA 5a. However, at some point during or following the trial, all the questionnaires, except those of the twelve jurors, the six alternates and four additional prospective jurors, were lost. *Id.* The juror questionnaires of the remaining 193 prospective jurors have never been located. *Id.*

2. The California Supreme Court

On direct appeal from his conviction, Ayala challenged the ex parte, *in camera Batson* hearings as being unconstitutional. PA 5a. Ayala also appealed on the basis that the loss of the jury

questionnaires deprived him of his constitutional right to a meaningful appeal of the denial of his *Batson* motions.[3] *Id.* A divided California Supreme Court upheld Ayala's conviction on the basis of harmless error, with a vigorous dissent by Chief Justice George. PA 189a-261a.

The court found that "no matters of trial strategy were revealed" by the prosecution during the *Batson* hearings.[4] PA 10a, 200a. The court held "as a matter of state law," that "it was error to exclude defendant from participating in [the *Batson* hearings]." PA 10a, 200a. Relying on multiple federal cases which themselves rely on federal constitutional law, the court concluded: "it seems to be almost universally recognized that ex parte [*Batson* hearings] ... should not be conducted unless compelling reasons justify them." PA 201a, 10a-11a, 14a-15a (citing, among other cases, *United States v. Roan Eagle*, 867 F.2d 436, 441 (8th Cir. 1989); *United States v. Garrison*, 849 F.2d 103, 106 (4th Cir. 1988); *United States v. Gordon*, 817 F.2d 1538, 1541 (11th Cir. 1987)). In Ayala's case, because the prosecution revealed no matters of trial strategy during the *Batson* hearings, there were no such "compelling reasons," and the court "concluded that error occurred under state law." PA 11a, 203a.

In recognizing error under state law, the California Supreme Court quoted extensively from

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[3] Ayala also appealed on numerous other grounds. *See, e.g.*, PA 214a-226a.

[4] The three ex parte, *in camera Batson* hearings conducted by the trial court in Ayala's case are referred to as "the *Batson* hearings."

United States v. Thompson, 827 F.2d 1254 (9th Cir. 1987), a case in which the Ninth Circuit held the ex parte *Batson* hearings to violate federal constitutional law. PA 15a, 201a-203a. For example, the court took from *Thompson* that "[a]bsent such compelling justification, ex parte proceedings are anathema in our system of justice and ... may amount to a denial of due process." PA 202a-203a (quoting *Thompson*, 827 F.2d at 1258-59). The California Supreme Court agreed with *Thompson*, stating: "it is error in particular to conduct ex parte proceedings on a *Wheeler* motion because of the risk that defendant's inability to rebut the prosecution's stated reasons will leave the record incomplete." PA 203a. The court thus held "that error occurred under state law, and we have noted *Thompson's* suggestion that excluding the defense from a *Wheeler*-type hearing may amount to a denial of due process." *Id.*

Regarding prejudice, in spite of finding error, the California Supreme Court held "that the error was harmless under state law (*People v. Watson* (1956) 46 Cal. 2d 818, 836), and that, if federal error occurred, it, too, was harmless beyond a reasonable doubt (*Chapman v. California* (1967) 386 U.S. 18, 24) as a matter of federal law. On the record before us, we are confident that the challenged jurors were excluded for proper, race-neutral reasons." PA 203a.

The California Supreme Court rejected Ayala's claim regarding the lost juror questionnaires on the basis of prejudice, finding that even if the loss of the questionnaires "was federal error, it was harmless beyond a reasonable doubt (*Chapman v. California*, supra, 386 U.S. 18, 24) ...." PA 25a, 213a.

In dissent, Chief Justice George vociferously disagreed with the California Supreme Court majority's "unprecedented conclusion that the erroneous exclusion of the defense from a crucial portion of jury selection proceedings may be deemed harmless." PA 6a, 245a. The Chief Justice pointed out that "the majority would be unable to properly rely upon the record made below to reach a reliable decision on the *Wheeler/Batson* issue. The record on this issue is incomplete, having been erroneously constructed with the input of only the prosecution and the court, and without crucial and necessary participation by defendant and his counsel." PA 253a-254a. Chief Justice George reasoned that "it is unrealistic to expect that a judge in the midst of trial will be able to pick out the discrepancies in a prosecutor's justifications, especially where, as here, 70 panelists, whose questionnaires alone covered 77 questions, participated in the general voir dire." PA 257a. Chief Justice George found the record to be "irremediably incomplete" and that because of the lost juror questionnaires, "the record cannot be reconstructed." PA 260a, 256a. The dissent thus concluded that "we simply cannot credit this record, and an appellate court cannot serve its review function when it cannot be satisfied that the record is complete as to the relevant facts." PA 258a (citing *Thompson*, 827 F.2d at 1261).

3. The Ninth Circuit's Federal Habeas Review

On habeas review, the Ninth Circuit considered two of Ayala's claims of constitutional violation: (i) the exclusion of Ayala and his counsel from the *Batson* hearings; and (ii) the loss of the

juror questionnaires. PA 6a-8a. These claims were reviewed by the Ninth Circuit pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). PA 2a.

The Ninth Circuit held that the California Supreme Court either determined that Ayala's exclusion from the *Batson* hearings was federal constitutional error, or made no determination as to whether this was federal constitutional error. PA 2a, 22a n.5. The Ninth Circuit therefore conducted a de novo review of Ayala's exclusion from the *Batson* hearings to conclude that this was federal constitutional error. PA 2a. The court similarly found the loss of the juror questionnaires to be federal constitutional error. PA 26a.

The Ninth Circuit reviewed the California Supreme Court's prejudice holding that any federal error in Ayala's case was harmless, under the standard prescribed in *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (whether the error had a "substantial and injurious effect or influence in determining the jury's verdict"). PA 2a, 31a. The court held that "Ayala has met the *Brecht* standard. The prejudice he suffered was the deprivation of the opportunity to develop, present, and likely prevail on his *Batson* claim." PA 34a.

The Ninth Circuit reasoned as follows:

> Here, it is probable that the state's errors precluded Ayala from turning what is a very plausible *Batson* claim – the challenge to the prosecution's strikes of all minority jurors – into a winning one by preventing defense

counsel from performing the two "crucial functions" we identified in [*United States v. Thompson*, 827 F.2d 1254, 1260-61 (9th Cir. 1987)]. First, Ayala's counsel could have pointed out where the prosecution's purported justifications might be pretextual or indicate bad faith. Although the trial judge may have been able to "detect some of these deficiencies by himself, ... there might be arguments [he] would overlook" because he was "unassisted by an advocate." *Thompson*, 827 F.2d at 1260-61. The jury selection process took over three months and comprises more than six thousand pages of the record. The trial judge, attempting to evaluate the prosecution's reasons for striking the jurors in light of this massive amount of information, was almost certain to forget or overlook key facts, but could have been substantially aided by the presence of participants in the process adverse to the prosecution. In particular, Ayala's lawyers could have pointed out when the prosecutor's proffered reason for striking a black or Hispanic juror applied "just as well to an otherwise-similar nonblack [or non-Hispanic] who [was] permitted to serve." *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005). The Supreme Court has emphasized the importance of this sort of "comparative juror analysis" to determining whether a prosecutor's reasons for challenging a minority juror

were pretextual. *Id.*; *see also Snyder v. Louisiana*, 552 U.S. 472, 483–85 (2008). ...

Second, Ayala's counsel could have "preserve[d] for the record, and possible appeal, crucial facts bearing on the judge's decision." *Thompson*, 827 F.2d at 1261. We cannot know many of the facts material to whether the prosecution's stated reasons were false, discriminatory, or pretextual because defense counsel was not able to preserve relevant facts regarding prospective jurors' physical appearances, behavior, or other characteristics. Although the trial judge could have been aware of these facts, an appellate court "can only serve [its] function when the record is clear as to the relevant facts, or when defense counsel fails to point out any such facts after learning of the prosecutor's reasons." *Id.* ...

This second deficiency is greatly augmented by the loss of the jury questionnaires. ... We are unable to evaluate the legitimacy of some of the prosecution's proffered reasons for striking the black and Hispanic jurors because they referred to questionnaires that are now lost. The loss of the questionnaires also leaves us lacking potentially crucial information about certain individuals who were neither the subject of Ayala's *Batson* challenge

> nor ultimately served as jurors. Thus, we cannot perform a fair comparative juror analysis as required by *Batson*. *See Miller-El v. Dretke*, 545 U.S. at 241.
>
> Even so, we have substantial reason to question the motivation of the prosecution in engaging in its peremptory challenges of the black and Hispanic jurors. In conducting our inquiry, we must keep in mind the strength of Ayala's prima facie case. "[T]he statistical evidence alone raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors." [*Miller-El v. Cockrell*, 537 U.S. 322, 342 (2003)]. That the prosecution struck each of the seven black or Hispanic jurors available for challenge establishes a basis for significant doubt of its motives: "[h]appenstance is unlikely to produce this disparity." *Id.*

PA 35a-38a (footnotes omitted). The Ninth Circuit then launched into a 14-page analysis of the prosecution's reasons for striking three of the minority jurors, in order to demonstrate that even on the partial surviving record, many of the prosecution's reasons appear to be false, discriminatory, or pretextual. PA 38a-51a.

The Ninth Circuit concluded its finding of prejudice under the *Brecht* standard as follows:

> Because the defense was excluded from the *Batson* proceedings, it could not

bring necessary facts and arguments to the attention of the trial judge, the institutional actor best positioned to evaluate the prosecution's credibility and to determine if its proffered reasons for striking the minority jurors were its actual and legitimate reasons. Furthermore, because the defense was excluded from the *Batson* proceedings, the appellate courts reviewing this case cannot engage in a proper comparative juror analysis, or know what other facts and arguments might be employed to demonstrate that the proffered reasons were false, facially discriminatory, and pretextual. The latter form of prejudice was exacerbated when the vast majority of the juror questionnaires were lost.

Even on this deficient record, Ayala's *Batson* claim is compelling: the prosecution struck all seven of the black and Hispanic jurors in a position to serve on the jury, and many of its proffered race-neutral reasons are highly implausible. Given the strength of Ayala's prima facie case, the evidence that the prosecution's proffered reasons were false or discriminatory, and the inferences that can be drawn from the available comparative juror analysis, it is "impossible to conclude that [Ayala's] substantial rights were not affected" by the exclusion of defense counsel from the *Batson* proceedings. *Kotteakos v. United States*, 328 U.S. 750, 765 (1946).

> Ayala has suffered prejudice under *Brecht*, and is entitled to relief. When that demonstration of prejudice is supplemented by the state's loss of the juror questionnaires, the case for prejudice under *Brecht* is even more clear.

PA 52a-53a.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The California Supreme Court Either Found Federal Error, in Favor of Ayala, or Intentionally Did Not Reach the Question of Federal Error. Assuming the California Supreme Court Found Federal Error, the Ninth Circuit Correctly Followed AEDPA in Reviewing This Finding.

a. The Best Interpretation of the California Supreme Court's Decision Is That the Court Found Federal Error, Because Its Finding of *Wheeler* Error Under California Law Necessarily Encompasses *Batson* Error Under Federal Law and the Court Based Its Decision on Federal Law.

The California Supreme Court made no express finding as to whether the exclusion of Ayala and his counsel from the *Batson* hearings was federal constitutional error. PA 11a. Rather, the court held that it was state error to exclude Ayala and his

lawyer from the *Wheeler* [*Batson*] hearings. PA 10a, 200a.

There are two reasonable bases for inferring that the California Supreme Court found federal error. First, the court must have inherently found federal error because "California courts interpret a violation of *Wheeler* – California's state equivalent of *Batson* – as proof of a violation of *Batson*. *See People v. Yeoman*, 72 P.3d 1166, 1187 (Cal. 2003)." PA 15a. Under *Batson*, before the prosecution is required to state its reasons for a peremptory strike, the defense must make a prima facie showing to "raise an inference" that the strike was made based on race. *Batson v. Kentucky*, 476 U.S. 79, 96-97 (1986). Under California's *Wheeler* standard, before the prosecution is required to state its reasons for a peremptory strike, the defense must "show a strong likelihood that" the strike was impermissibly based on race. *People v. Wheeler*, 22 Cal.3d 258, 280 (1978). California's standard is thus more demanding than *Batson*. *See Johnson v. California*, 545 U.S. 162, 173 (2005). It follows that since the California Supreme Court found state law error in the *Wheeler* procedure followed in Ayala's case, the court must necessarily also have found this to be federal constitutional error according to *Batson* procedure. As the Ninth Circuit correctly put it: "[B]ecause *Wheeler* is *Batson*-plus, and because its *Wheeler* holding relied on *Batson* case law, it is impossible that the California Supreme Court found no *Batson* error on the merits while finding *Wheeler* error on the merits." PA 22a n.6. The Ninth Circuit's holding is consistent with *Johnson v. Williams*, 133 S. Ct. 1088, 1096 (2013), in which this Court held that "if the state-law rule subsumes the federal standard – that is, if it is at

least as protective as the federal standard – then the federal claim may be regarded as having been adjudicated on the merits."

Second, the California Supreme Court based its finding of state law error on federal constitutional law. The court held that it is "almost universally recognized" that ex parte *Batson* hearings are erroneous, expressly relying on multiple federal cases that themselves rely on federal constitutional law. PA 201a, 10a-11a, 14a-15a (citing, among other federal cases, *United States v. Roan Eagle*, 867 F.2d 436, 441 (8th Cir. 1989); *United States v. Garrison*, 849 F.2d 103, 106 (4th Cir. 1988); *United States v. Gordon*, 817 F.2d 1538, 1541 (11th Cir. 1987)). In addition, the California Supreme Court's reasoning quoted extensively from *United States v. Thompson*, 827 F.2d 1254 (9th Cir. 1987), in which the Ninth Circuit held ex parte *Batson* hearings to violate federal constitutional law. PA 15a, 201a-203a. Indeed, the court's ultimate finding of state law error in Ayala's case mirrored the reasoning in *Thompson*: "it is error in particular to conduct ex parte proceedings on a *Wheeler* motion because of the risk that defendant's inability to rebut the prosecution's stated reasons will leave the record incomplete." PA 203a (where *Thompson*, 827 F.2d at 1258-59 states: "[a]bsent such compelling justification, ex parte proceedings are anathema in our system of justice and ... may amount to a denial of due process."). "The obvious message here is that the California Supreme Court believed that the federal constitutional issue should be decided the same way as the state law issue." PA 15a.

That the California Supreme Court relied for its finding of state law error upon federal cases and federal law, is in and of itself sufficient to conclude that the California Supreme Court also found federal error. This Court has held that when a state court relies on federal cases or federal law to reach a finding on an issue of state law, without expressly making a finding on the federal issue, the state court has similarly decided the federal issue. *Johnson v. Williams*, 133 S. Ct. 1088, 1098-99 (2013). In *Williams*, a California court had found there to be no state law error partly on the basis of federal cases relying on federal law, without expressly making any finding as to federal error. *Id.* This Court held in *Williams*, that because the California court's state law error analysis relied on federal law, the court had likewise found no error under federal law. *Id.*

The obverse (of the *Williams* case above) is necessarily true with respect to the California Supreme Court's analysis in Ayala's case. PA 16a. The California Supreme Court found the exclusion of Ayala from the *Batson* hearings to be error under state law (in comparison to *Williams*, where the state court found no state law error), and cited to multiple federal cases relying on federal law. PA 201a-203a. This Court reasoned, in *Williams*, that the California Supreme Court "did not expressly purport to decide a federal constitutional question, but its discussion of [the federal cases] shows that the California Supreme Court understood itself to be deciding a question with federal constitutional dimensions." *Johnson v. Williams*, 133 S. Ct. 1088, 1098 (2013). Here, the California Supreme Court also did not expressly purport to decide the federal constitutional question, but it too must have understood itself to be

deciding a question with federal constitutional dimensions, and to be deciding it in Ayala's favor by its reliance on cases that held analogous conduct to be erroneous under the federal Constitution. PA 16a-17a.

b. The Ninth Circuit Correctly Followed AEDPA in Reviewing the California Supreme Court's Finding of Federal Error.

Right at the outset, the Ninth Circuit recognized that Ayala's appeal was to be reviewed pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[5] PA 2a. The Ninth Circuit held that the California Supreme Court either determined that Ayala's exclusion from the *Batson* hearings was federal constitutional error, or made no determination as to whether this was federal constitutional error. PA 2a, 22a n.5. Of these two possibilities, the Ninth Circuit decided it

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[5] The AEDPA provision at issue reads as follows: "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

28 U.S.C. § 2254(d).

more likely that the California Supreme Court found federal constitutional error, because the California Supreme Court (i) found state law error, (ii) based on federal constitutional law, (iii) and the same analysis would lead to a finding of federal constitutional error, (iv) which is the approach supported by this Court in *Williams* (as discussed in the previous section). *See* PA 14a-17a.

Assuming the California Supreme Court found federal error in favor of Ayala, the proper standard of review for this finding would be an issue of first impression. PA 12a n.4. Accordingly, there are three possible standards of review: (i) deference to the California Supreme Court's finding pursuant to AEDPA *in favor of Ayala*;[6] (ii) de novo review; and (iii) no review at all, on the basis that a state court's determination in favor of Ayala cannot be relitigated on habeas review. *Id.* Under all three standards of review, the result is the same according to the Ninth Circuit's holding: there was federal constitutional error in Ayala's trial. PA 12a n.4.

The State argues that under AEDPA review, Ayala should lose, because there is no clearly established federal law forbidding the exclusion of a defendant and his counsel from *Batson* hearings. *See* Certiorari Pet., pp. 18-20. The State is mistaken. The exclusion of the defense from *Batson* hearings is forbidden according to the Sixth Amendment's right

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[6] In this case, the California Supreme Court's determination that there was federal constitutional error (in favor of Ayala), could only be overturned if this determination "was contrary to, or involved an unreasonable application of, clearly established Federal law ...." 28 U.S.C. § 2254(d).

to counsel. PA 55a-56a. The Sixth Amendment's right to counsel applies to all 'critical' stages of the proceedings because defendants must be guaranteed "counsel's assistance whenever necessary to assure a meaningful 'defence.'" *United States v. Wade*, 388 U.S. 218, 224–25 (1967). This right has been clearly established federal law since its inception, and its scope has been well established by multiple holdings from this Court. *See, e.g., White v. Maryland*, 373 U.S. 59, 60 (1963); *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963). "The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 656 (1984). Only when the essential guarantee of the assistance of counsel has been met can there be a "true adversarial criminal trial ... envisioned by the Sixth Amendment ...." *Id.* "[I]f the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." *Cronic*, 466 U.S. at 656-57. Indeed, without the right to counsel, defendants cannot be guaranteed a fair trial. *See id.* at 658 ("[T]he right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial."). "The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not still be done." *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938) (citation omitted).

This Court has held that "jury selection is 'a critical stage' of the felony trial ...." *Peretz v. United States*, 501 U.S. 923, 950 (1991) (citing *Gomez v. United States*, 490 U.S. 858, 873 (1989)). "[I]n

affirming voir dire as a critical stage of the criminal proceeding, during which the defendant has a constitutional right to be present, the Court wrote: '[W]here the indictment is for a felony, the trial commences at least from the time when the work of empanelling the jury begins.'" *Gomez v. United States*, 490 U.S. 858, 873 (1989) (quoting *Lewis v. United States*, 146 U.S. 370, 374 (1892) (citations omitted)). Given that (i) the Sixth Amendment's right to counsel applies to all critical stages of trial, and that (ii) jury selection is a critical stage of trial, it follows that defendants have a constitutional right to counsel at *Batson* hearings, and this right is violated when counsel is excluded from *Batson* hearings without compelling reasons.

Batson made clear that a court must consider "all relevant circumstances" in deciding whether a prosecutor's stated reasons for striking a particular juror are race-neutral, and, if race-neutral, whether they are his actual reasons. 476 U.S. at 96–99; *see Miller-El v. Dretke*, 545 U.S. 231, 240 (2005). Thus, Defense counsel must perform "two crucial functions" at *Batson* hearings. *United States v. Thompson*, 827 F.2d 1254, 1260 (9th Cir. 1987). The first is "to point out to the district judge where the government's stated reason may indicate bad faith." *Id.* at 1260. The second is to "preserve for the record, and possible appeal, crucial facts bearing on the judge's decision." *Id.* at 1261. The *Thompson* Court explained:

> All we have before us concerning this issue is the prosecutor's explanation of her reasons and the district judge's ruling .... [I]f we are to review the

> district judge's decision, we cannot affirm simply because we are confident he must have known what he was doing. We can only serve our function when the record is clear as to the relevant facts, or when defense counsel fails to point out any such facts after learning of the prosecutor's reasons .... Here, the record's silence cannot be reassuring.

Thompson, 827 F.2d at 1261. Only with the presence and assistance of defense counsel can a trial judge and subsequent appellate judges properly evaluate discriminatory intent by the prosecution under *Batson*. PA 58a; *Thompson*, 827 F.2d at 1260-61. Excluding the defense from *Batson* hearings without some compelling justification therefore violates the Constitution. PA 58a; *Thompson*, 827 F.2d at 1259-61.

The California Supreme Court recognized defendants' right to counsel at *Batson* hearings, admitting that: "it seems to be almost universally recognized that ex parte [*Batson* hearings] ... should not be conducted unless compelling reasons justify them." PA 201a, 10a-11a, 14a-15a (citing, among other cases, *United States v. Roan Eagle*, 867 F.2d 436, 441 (8th Cir. 1989); *United States v. Garrison*, 849 F.2d 103, 106 (4th Cir. 1988); *United States v. Gordon*, 817 F.2d 1538, 1541 (11th Cir. 1987)). This Court has also held, with regard to *Batson* hearings, that "[i]n the rare case in which the explanation for a challenge would entail confidential communications or reveal trial strategy, an *in camera* discussion can be arranged." *Georgia v. McCollum*, 505 U.S. 42, 58

(1992). This of course means that absent compelling reasons for an *in camera Batson* hearing (as in Ayala's case), the exclusion of counsel from *Batson* hearings is unconstitutional.

The State doggedly harps on the fact that *Batson* declined to set forth "particular procedures" to be followed upon a *Batson* challenge by the defense. *See* Certiorari Pet., pp. 3, 7, 10, 12, 13, 16, 18-20. The State is essentially arguing that no clearly established rule exists unless this Court has ruled on the particular factual scenario implicating a constitutional right. The State's argument is preposterous, as it would require this Court to instantiate specific rules for each and every factual scenario in which a proceeding may be unconstitutional. That this Court declined to micromanage the appropriate methods a trial court may employ to ensure constitutional rights are protected, does not mean there are no clearly established constitutional rights which must be observed.

This Court need not prescribe particular procedures according to which *Batson* hearings must occur, any more so than the Court need prescribe particular procedures according to which any other part of a constitutionally-afforded trial must occur (such as opening statement, closing argument or witness examination). That this Court did not specify all of the procedures for conducting *Batson* hearings is not a preordained blessing for trial courts to conduct *Batson* hearings in any manner whatsoever without constraint. It means courts may exercise discretion in conducting *Batson* hearings,

provided they are conducted in a constitutional manner.

The State mistakenly argues that because some courts have permitted the exclusion of defense counsel from *Batson* hearings in compelling circumstances, there is no clear rule prohibiting the exclusion of defense counsel from *Batson* hearings. *See* Certiorari Pet., pp. 19-20. The Ninth Circuit correctly dispelled this faulty notion outright: "[M]any constitutional rules recognize exceptions – e.g., the exigency exception to the Fourth Amendment prohibition on warrantless searches, and the public safety exception to *Miranda* – but that does not make the rules any less clear." PA 55a n.21; *see also Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (noting that the federal constitutional due process right to defend "is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process").

The exclusion of defense counsel from *Batson* hearings is unconstitutional (barring compelling reasons), just as the exclusion of defense counsel from other critical stages of trial (e.g., closing argument or witness examination) is unconstitutional (barring exceptional circumstances). Although compelling reasons permitting the exclusion of defense counsel from *Batson* hearings might sometimes exist, this does nothing to detract from the clear establishment of the rule that excluding defense counsel from *Batson* hearings is unconstitutional, unless there are compelling reasons.

2. In the Alternative, Assuming the California Supreme Court Did Not Reach the Question of Federal Error, the Ninth Circuit Correctly Applied De Novo Review.

In the alternative, assuming the California Supreme Court made no determination as to whether Ayala's exclusion from the *Batson* hearings was federal constitutional error, the proper standard of review is de novo. PA 12a n.4, 17a; *See Cone v. Bell*, 556 U.S. 449, 472 (2009) (reviewing de novo because the "[state] courts did not reach the merits of [the petitioner's constitutional] claim"); *Lott v. Trammel*, 705 F.3d 1167, 1218 (10th Cir. 2013); *Harris v. Thompson*, 698 F.3d 609, 624 (7th Cir. 2012). De novo is the only logical standard of review, as AEDPA cannot apply if there was no decision by the California Supreme Court, i.e., no deference can be given to a decision that was never rendered. *See Wiggins v. Smith*, 539 U.S. 510, 534 (2003) ("[O]ur review is not circumscribed by a state court conclusion with respect to prejudice, as neither of the state courts below reached this prong of the *Strickland* analysis."); *Rompilla v. Beard*, 545 U.S. 374, 390 (2005) ("Because the state courts found the representation adequate, they never reached the issue of prejudice ..., and so we examine this element of the *Strickland* claim *de novo*") (citations omitted); *Porter v. McCollum*, 558 U.S. 30, 39 (2009) ("Because the state court did not decide whether *Porter's* counsel was deficient, we review this element of *Porter's Strickland* claim de novo."). "Indeed, respect for state judges requires recognizing that a state court's silence with respect to a fairly presented

federal claim may be intentional and prudent." PA 19a.

Under de novo review, the Ninth Circuit correctly held that it was federal constitutional error to exclude Ayala and his counsel from the *Batson* hearings, because there was no compelling justification for doing so, given that none of the prosecution's reasons for its peremptory strikes revealed matters of trial strategy. PA 24a.

The Ninth Circuit also properly applied de novo review in analyzing the loss of the juror questionnaires, because the California Supreme Court decided this claim based on prejudice alone, and did not reach the question of whether the loss of the questionnaires constituted federal error. PA 25a, 213a ("Thus, even if there was federal error, it was harmless beyond a reasonable doubt."). The Ninth Circuit correctly found that the loss of the juror questionnaires deprived Ayala of his federal due process right to a meaningful appeal, because the lost questionnaires render the record inadequate for appeal. PA 25a-27a.

a. The *Richter/Williams* Presumption Is Inapplicable Because the Basis for the California Supreme Court's Holding Is Known.

The *Richter/Williams* presumption is inapplicable here. *Harrington v. Richter*, 131 S. Ct. 770, 784-85 (2011); *Johnson v. Williams*, 133 S. Ct. 1088, 1094 (2013). In *Richter* and *Williams*, this Court established the rebuttable presumption that when a state court is silent as to a fairly presented federal claim, the claim was adjudicated (rejected) on

the merits (against the petitioner) absent "any indication or state-law procedural principles to the contrary." *Richter*, 131 S. Ct. at 784-85; *Williams*, 133 S. Ct. at 1094. "The presumption may be overcome when there is reason to think some other explanation for the state court's decision is more likely." *Richter*, 131 S. Ct. at 785.

Here, the *Richter/Williams* presumption is rebutted because there is excellent reason to think that the "most likely interpretation" of the California Supreme Court's finding is that Ayala's exclusion from the *Batson* hearings was federal constitutional error, for the reasons discussed in detail in Section 1(a), namely: that the California Supreme Court (i) found state law error, (ii) based on federal constitutional law, (iii) and the same analysis would lead to a finding of federal constitutional error, (iv) which is the precise approach supported by this Court in *Williams*, 133 S. Ct. at 1098-99. PA 14a-17a.

In addition, it was unnecessary for the California Supreme Court to find federal error in order to reject Ayala's claim. PA 14a. Ayala would have to meet two prongs to prevail on his claim of federal constitutional error: first, Ayala would have to demonstrate federal error, and second, he would have to demonstrate prejudice. PA 6a. The California Supreme Court was able to, and did, deny Ayala relief based only on the second prong of prejudice, by concluding that the federal error, if any, was harmless. PA 14a, 203a. The State seeks to apply the *Richter/Williams* presumption against Ayala to the issue of federal error, even when there was no reason for the California Supreme Court to

reach the question of federal error. In accordance with "long established legal principles, the California Supreme Court had every reason not to decide unnecessarily a question of federal constitutional law." PA 21a, 18a; *Clinton v. Jones*, 520 U.S. 681, 690 n.11 (1997) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that courts ought not to pass on questions of constitutionality ... unless such adjudication is unavoidable."). Thus, the California Supreme Court had no reason to reach the question of federal error once it had decided that any error would have been harmless, as the federal error question was of no consequence.

The State misunderstands the purpose of the *Richter/Williams* presumption. The presumption addresses the situation in which a state court has denied relief, while being silent as to a federal claim. Here, however, the California Supreme Court was not silent as to Ayala's federal claim. The court analyzed his claim, discussing the applicable federal authority in depth, and specifically denied relief only on the basis of prejudice. Thus, there is no need to apply any presumption.

Most troubling is the State's attempt to impose the *Richter/Williams* decisions to create an absurd fictional presumption that the exclusion of Ayala and his counsel from the *Batson* hearings was not federal error. Irrespective of what can be presumed from the California Supreme Court's reasoning, it is impossible to infer that the court found Ayala's exclusion not to be federal error. The court found Ayala's exclusion to be state law error, while relying on federal law, and the court's same

analysis can only lead to a finding of federal error – this error being "almost universally recognized," as the court itself observed. PA 201a.

3. The Ninth Circuit Correctly Reviewed the California Supreme Court's Harmless Error (*Chapman*) Decision Under the *Brecht* Standard of Review.

The California Supreme Court held that if federal error occurred in Ayala's case, any such error "was harmless beyond a reasonable doubt" pursuant to *Chapman v. California*, 386 U.S. 18, 24 (1967). PA 203a. Prior to *Fry v. Pliler*, 551 U.S. 112 (2007), this decision was subject to the AEDPA/*Chapman* standard of review, i.e., whether the California court's determination of harmless error (under *Chapman*) constituted an unreasonable application of federal law. PA 32a n.13. However, in *Fry*, this Court clarified that the correct standard of review for harmless error determinations under AEDPA is set forth in *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993). *Fry*, 551 U.S. at 119-122. The *Brecht* standard is whether the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 623. In *Fry*, this Court held that the *Brecht* standard "subsumes" the "more liberal" AEDPA/*Chapman* standard. *Fry*, 551 U.S. at 119-120. The Ninth Circuit thus correctly reviewed the California Supreme Court's harmless error decision under *Brecht's* "substantial and injurious effect" standard. PA 31a.

The State manufacturers an argument that the courts have "struggled" as to how to apply *Brecht* when reviewing harmless error decisions under AEDPA, citing cases from the Ninth and Seventh

Circuits. Certiorari Pet., pp. 24-25. There is no "struggle" among the courts that *Brecht* is the standard to be applied when reviewing harmless error decisions under AEDPA, as all of the State's cited cases recognize that *Brecht* is the governing standard of review. *See Merolillo v. Yates*, 663 F.3d 444, 455 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 102 (2012); *Jones v. Basinger*, 635 F.3d 1030, 1052 (7th Cir. 2011); *Cudjo v. Ayers*, 698 F.3d 752, 768-69 (9th Cir. 2012); *Kamlager v. Pollard*, 715 F.3d 1010, 1016 (7th Cir. 2013); and *Johnson v. Acevedo*, 572 F.3d 398, 404 (7th Cir. 2009). The cases cited by the State merely noted that courts may apply the AEDPA/*Chapman* standard before applying *Brecht*, and in some of the State's cited cases the courts indeed disposed of claims based on an AEDPA/*Chapman* analysis without having to perform a *Brecht* analysis. *See id.* This is of no consequence, because the *Brecht* standard subsumes the AEDPA/*Chapman* standard, and therefore any claim which cannot meet the AEDPA/*Chapman* standard necessarily cannot meet the *Brecht* standard. *See Fry*, 551 U.S. at 119-120. Similarly, a claim which satisfies the *Brecht* standard necessarily also satisfies the AEDPA/*Chapman* standard. *See id.*; PA 32a n.13. Indeed, in Ayala's case, the Ninth Circuit held that its finding of prejudice under *Brecht* inherently constitutes a finding of prejudice under AEDPA/*Chapman*. PA 32a n.13.

The State then wrongly criticizes the application of *Fry* in Ayala's case, because the Ninth Circuit applied *Fry* "to set aside [a state court's decision] without any regard for the reasonableness of the state court's analysis of the harmless-error question." Certiorari Pet., p. 25. This is not error –

it is the precise approach dictated by *Fry*: "We hold that in § 2254 proceedings a court must assess the prejudicial impact of constitutional error in a state-court criminal trial under the 'substantial and injurious effect' standard set forth in *Brecht* ..., whether or not the state appellate court recognized the error and reviewed it for harmlessness under the 'harmless beyond a reasonable doubt' standard set forth in *Chapman*." 551 U.S. at 121-22 (emphasis added) (citations omitted).

Regardless, the Ninth Circuit correctly held that the federal errors in Ayala's case (exclusion from the *Batson* proceedings and loss of the juror questionnaires) were prejudicial under *both* the *Brecht* and the AEDPA/*Chapman* standards. PA 32a n.13. The Ninth Circuit's reasoning was solid:

> Here, it is probable that the state's errors precluded Ayala from turning what is a very plausible *Batson* claim – the challenge to the prosecution's strikes of all minority jurors – into a winning one by preventing defense counsel from performing the two "crucial functions" we identified in [*Thompson*, 827 F.2d at 1260-61]. First, Ayala's counsel could have pointed out where the prosecution's purported justifications might be pretextual or indicate bad faith. ...
>
> Second, Ayala's counsel could have "preserve[d] for the record, and possible appeal, crucial facts bearing on the judge's decision." *Thompson*, 827 F.2d at 1261. ...

> This second deficiency is greatly augmented by the loss of the jury questionnaires. ... Thus, we cannot perform a fair comparative juror analysis as required by *Batson*. *See* [*Miller-El v. Dretke*, 545 U.S. 231, 241 (2005)].
>
> Even so, we have substantial reason to question the motivation of the prosecution in engaging in its peremptory challenges of the black and Hispanic jurors. In conducting our inquiry, we must keep in mind the strength of Ayala's prima facie case. "[T]he statistical evidence alone raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors." [*Miller-El v. Cockrell*, 537 U.S. 322, 342 (2003)]. That the prosecution struck each of the seven black or Hispanic jurors available for challenge establishes a basis for significant doubt of its motives: "[h]appenstance is unlikely to produce this disparity." *Id.*

PA 35a-38a (footnotes omitted).

The unreasonableness of the California Supreme Court's harmless error decision is perhaps best evidenced by the fact that if this Court were now faced with reviewing the rejection of Ayala's *Batson* challenges made at his trial, the Court would be unable to do so because the record is "irremediably incomplete" (as Chief Justice George said in his dissent from the California Supreme Court's ruling).

PA 260a. The Ninth Circuit agreed: "[B]ecause the defense was excluded from the *Batson* proceedings, the appellate courts reviewing this case cannot engage in a proper comparative juror analysis, or know what other facts and arguments might be employed to demonstrate that the proffered reasons were false, facially discriminatory, and pretextual." PA 52a. This prejudice is exacerbated by the loss of the juror questionnaires. *Id.*

The Ninth Circuit soundly concluded that "Ayala has met the *Brecht* standard. The prejudice he suffered was the deprivation of the opportunity to develop, present, and likely prevail on his *Batson* claim." PA 34a.

4. There Is No Conflict Among the Circuits that When AEDPA Applies, the State Court's Error Analysis Is to be Governed by AEDPA, and the Prejudice Analysis Is to be Governed by *Brecht*.

The Ninth Circuit's review of Ayala's appeal was governed by AEDPA. PA 2a. As discussed above, the Ninth Circuit reviewed Ayala's claim of federal constitutional error according to the two prongs of which it is comprised: (1) the existence of federal error, and (2) prejudice to Ayala resulting from the error. PA 6a. The correct method of analysis for Ayala's claim is to review each of these prongs separately under AEDPA, as the Ninth Circuit did, which is in accordance with the method of analysis followed for claims of ineffective assistance of counsel brought under *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* claims also have two prongs: a defendant must show (1) that counsel's performance was deficient, and (2) that the

deficient performance prejudiced the defendant. *Id.* at 687. A *Strickland* claim only succeeds if both prongs are met, and fails if either prong is not satisfied. *Id.* State courts are thus able to deny *Strickland* claims by deciding only one of the prongs. In such cases, this Court reviews a *Strickland* claim by analyzing each prong separately under AEDPA. *Wiggins v. Smith*, 539 U.S. 510, 520-21, 528-29, 534 (2003); *Rompilla v. Beard*, 545 U.S. 374, 380-390 (2005); *Porter v. McCollum*, 558 U.S. 30, 39-40 (2009). Although the *Strickland* tests (for error and prejudice) and standards of review differ from those applicable in Ayala's case (*see Richter*, 131 S. Ct. at 788), the method of analysis (analyzing each prong separately under AEDPA) in reviewing *Strickland* claims is analogous.

In both *Wiggins* and *Rompilla*, this Court reviewed *Strickland* claims which had been denied based on the first *Strickland* prong, i.e., the state courts found no deficiency in counsel's performance. *Wiggins*, 539 U.S. at 517-18; *Rompilla*, 545 U.S. at 378. Applying AEDPA, this Court analyzed each *Strickland* prong separately. *Wiggins*, 539 U.S. at 520-21, 528-29, 534; *Rompilla*, 545 U.S. at 380-90. In both cases, the first prong was subject to AEDPA's "unreasonable application of law" standard, because this was the prong, which the state courts had decided. *See Wiggins*, 539 U.S. at 520-34; *Rompilla*, 545 U.S. at 380-89. The second prong (prejudice) was subject to de novo review, because this was the prong which the state courts had not decided. *Wiggins*, 539 U.S. at 534; *Rompilla*, 545 U.S. at 390.

This Court again followed the *Wiggins/Rompilla* method of reviewing each

Strickland prong separately in *Porter v. McCollum*, 558 U.S. 30 (2009), where the state court had denied relief based on the second *Strickland* prong, finding that the defendant suffered no prejudice. *Porter*, 558 U.S. at 36-37, 39-40. Applying AEDPA, this Court reviewed the first *Strickland* prong de novo, because the state court made no finding as to whether the defendant's counsel was deficient. *Id.* at 39. Only the second *Strickland* prong (prejudice) was subject to AEDPA's "unreasonable application of law" standard, because this was the prong, which the state court had decided (and *Brecht* does not apply in *Strickland* cases). *Id.* at 40; *see* PA 34a n.14 (citing *Musladin v. Lamarque*, 555 F.3d 830, 834 (9th Cir. 2009)).

Here, the Ninth Circuit correctly followed the method of analysis set forth by this Court in *Wiggins*, *Rompilla* and *Porter* for reviewing – under AEDPA – claims comprising two prongs, by separately analyzing each of the two prongs of Ayala's claim: (1) the existence of federal error, and (2) prejudice to Ayala resulting from the error. Regarding the first prong: (i) assuming the California Supreme Court found federal error (in Ayala's favor), the Ninth Circuit affirmed this finding both under AEDPA's "unreasonable application of law" standard and under de novo review; and (ii) assuming the California Supreme Court made no determination as to whether Ayala's exclusion from the *Batson* hearings was federal error, the Ninth Circuit found federal error under de novo review. PA 12a n.4, 17a. Regarding the second prong, the Ninth Circuit found prejudice under the *Brecht* standard, which "subsumes" the "more liberal" AEDPA/*Chapman* standard, in accordance with *Fry*. PA 32a n.13, 34a.

The State wrongly takes issue with the *Wiggins*, *Rompilla* and *Porter* method of reviewing – under AEDPA – claims comprising two prongs, by separately analyzing each prong. Certiorari Pet., p. 18. The State argues that the appropriate method of review should be to analyze Ayala's federal claim "as a whole." *Id.* This approach is illogical, because one cannot properly analyze a scenario requiring two decisions, without examining both decisions. Nevertheless, the State argues for analyzing Ayala's federal claim "as a whole," because the State seeks to wrongly impose on Ayala the *Richter* standard of review, i.e., that under AEDPA, the California Supreme Court's judgment cannot be set aside unless there is "is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents." *See* Certiorari Pet., p. 18; *Richter*, 131 S. Ct. at 786.

Even if the State had its way and Ayala's claim were to be resolved "as a whole," the single decision on review would be the California Supreme Court's finding (pursuant to *Chapman v. California*, 386 U.S. 18, 24 (1967)) that "if federal error occurred, it, too, was harmless beyond a reasonable doubt." PA 203a. The State seems to agree that this would be the single question before the Court according to its Question Presented: "Whether a state court's rejection of a claim of federal constitutional error on the ground that any error, if one occurred, was harmless beyond a reasonable doubt ...." Certiorari Pet., p. i. This Court has ruled unequivocally in *Fry v. Pliler*, 551 U.S. 112, 121-22 (2007): "We hold that in § 2254 proceedings a court must assess the prejudicial impact of constitutional error in a state-court criminal trial under the 'substantial and

injurious effect' standard set forth in *Brecht*." Thus, *Brecht* – and not *Richter* – would be the controlling standard if Ayala's claim were to be resolved "as a whole."

The State's argument that *Richter's* "fairminded jurist" standard applies is incorrect. As the Ninth Circuit aptly explained to the dissent in Ayala's case (the dissent having taken the same position as the State):

> In *Fry*, 551 U.S. 112, the Supreme Court held that *Brecht* is the proper test for prejudice analysis under AEDPA. In *Richter*, handed down just four years later, the Supreme Court did not once mention *Fry* or *Brecht*. Furthermore, the Court's reference to "fairminded jurist" was not in the context of reviewing a state court's prejudice determination but rather in the context of whether a state court's determination regarding constitutional error was unreasonable. 131 S. Ct. at 785. .... The dissent thus seems willing to conclude that the Supreme Court radically changed *Brecht*, a nearly two decade old precedent – a case with central import in virtually all federal habeas adjudication, reaffirmed just [seven] years ago in *Fry* — without even a mention of that oft-cited case. There is no legal basis for the dissent's conclusion that a case cited almost 10,000 times to determine prejudice in habeas cases was sub silentio

> drastically overhauled in a discussion unrelated to prejudice.

PA 33a n.14.

Furthermore, *Richter's* "fairminded jurist" standard is specially tailored to reviewing whether there is error in *Strickland* cases (deficient representation by counsel), but not to Ayala's case. *See Harrington v. Richter*, 131 S. Ct. 770, 788 (2011) ("Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d)."). At issue here, is the standard of review to be applied to the prejudice prong of Ayala's claim. The *Richter* standard is not intended to be applied in Ayala's case, because the *Richter* standard is for reviewing decisions regarding the *error prong* of a claim. *See id.* at 785-86. Moreover, this is not a *Strickland* case, and *Strickland* cases are reviewed uniquely: "The standards created by *Strickland* and § 2254(d) are both 'highly deferential,' ..., and when the two apply in tandem, review is 'doubly' so ...." *Richter*, 131 S. Ct. at 788 (citations omitted).

The State is frustrated because it views the Ninth Circuit's approach as having avoided AEDPA review, arguing that the AEDPA "burden was not reduced by the fact that the state court did not state any definitive conclusion about whether there was federal error – any more than it would have been if the court had said nothing about the federal claim at all." Certiorari Pet., p. 18. In this regard, the State is its own source of frustration, because the State has it wrong. First, the best interpretation of the California Supreme Court's judgment is that the court did in fact find federal error (*see* Section 1(a)).

Second, the Ninth Circuit has conducted its entire review under AEDPA, and applied AEDPA correctly. The Ninth Circuit followed this Court's method in *Wiggins*, *Rompilla* and *Porter* for reviewing claims comprising two prongs under AEDPA. In so doing, AEDPA's "unreasonable application of law" standard is appropriate assuming the California Supreme Court found federal error in favor of Ayala, and is "subsumed" in the stricter *Brecht* standard of review for prejudice.

The State's argument that the Ninth Circuit's "*de novo* federal review under AEDPA" will open a floodgate of de novo review of state court rulings deserving of AEDPA review, is also of no moment. *See* Certiorari Pet., p. 22. First, the Ninth Circuit employed de novo review in two scenarios: (i) the scenario assuming the California Supreme Court found federal error in *Ayala's favor* (in which case the standard of review is an issue of first impression, with the likely alternative being the AEDPA standard, which would work against the State); and (ii) the scenario assuming the California Supreme Court made no determination as to whether there was federal error. As the State itself recognizes, the Ninth Circuit's decision in these scenarios applied de novo review "*under AEDPA*," i.e. not to the exclusion of AEDPA. *See* Certiorari Pet., p. 22 (emphasis added). The State's argument is thus nonsensical, because even under AEDPA, de novo review is required in these scenarios. Second, the method of review employed by the Ninth Circuit is correct (as discussed earlier in this section), and has always been the proper method of review to be employed since the passing of AEDPA. Therefore, the State's concern about opening a floodgate of de novo review

is unfounded, because such a 'floodgate' has always been open, and yet there has been no flood of de novo review by any federal court to which the State can point.

CONCLUSION

For at least the reasons stated above, Ayala respectfully requests that the State's petition for a writ of certiorari be denied.

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REPLY BRIEF

No. 13-1428

In the Supreme Court of the United States

KEVIN CHAPPELL, WARDEN, *Petitioner*,

v.

HECTOR AYALA, *Respondent*.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The State's petition presents the question whether a state court decision rejecting a federal claim on the ground that any error that may have occurred was harmless is an "adjudicat[ion] on the merits" for purposes of 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *See* Pet. i. That question is important and recurrent (*see* Pet. 22-23), and has produced a conflict in the circuits (Pet. 20-22)—indeed, one that has deepened in the time since the petition was filed. In addition, this case starkly illustrates how federal habeas courts can inappropriately set aside reasonable state-court decisions by first avoiding AEDPA's restrictions on *de novo* review of federal questions, and then mistaking this Court's decision in *Fry* v. *Pliler*, 551 U.S. 112 (2007), as a license to proceed "'without regard for the state court's harmlessness determination'" (Pet. App. 31a-32a; *see* Pet. 23-27). It is thus also an appropriate vehicle for this Court to provide further guidance as to the proper application of *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993), to a state court judgment subject to AEDPA deference.

1. Respondent first argues that the California Supreme Court implicitly held there was federal error in the jury selection process at respondent's trial (although the court "made no express finding" to that effect, Opp. 11), and that it was therefore appropriate for a federal habeas court either to accept that holding or to review the question *de novo* (Opp. 16). Alternatively, he argues that, if the state court did not resolve the question of federal error, *de novo* review "is the only logical standard of review" under AEDPA, because "no deference can be given to a decision that was never rendered." Opp. 22. The point these

arguments miss is that whether or not the state court thought there had been federal error, its ultimate judgment was that respondent's conviction should be sustained because, on the facts of the case, any error that might have occurred was harmless beyond a reasonable doubt. *See* Pet. App. 203a, 210a, 211a. That determination was an "adjudicat[ion] on the merits" for purposes of Section 2254(d); and the state judgment of conviction is the "decision" that may be set aside, under AEDPA, only if it was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" this Court. 28 U.S.C. § 2254(d)(1). Whether a habeas petitioner can make that demanding showing does not depend on what, if anything, the state court might have concluded about a point of federal law under the *de novo* standard that applies on direct appeal.

As the petition explains (at 15-18), that conclusion follows from this Court's prior cases. The Court has made clear that, absent some clear indication that a state court decision rested on some procedural principle, federal courts must presume that any federal claim raised in the case was adjudicated on the merits. *Harrington* v. *Richter*, 131 S. Ct. 770, 784-785 (2011). There need not be "an opinion from the state court explaining the state court's reasoning," nor any express announcement that a claim was rejected on the merits. *Id.* at 784. The presumption applies when the state court rejects a federal claim without expressly addressing it, absent unusual circumstances such as some clear indication that the claim was "overlooked." *Johnson* v. *Williams*, 133 S. Ct. 1088, 1094-1097 (2013). Rejection of a claim for unstated reasons could, of course, reflect a state court's determination that a federal error might have occurred, or indeed did occur, but was harmless in the context of the case. There is no reason to treat such

an adjudication differently if the state court explains its determination rather than simply incorporating it in an unexplained judgment. And if rejection of a federal claim for unstated reasons—potentially including a conclusion of harmlessness—is an "adjudicat[ion] on the merits" for purposes of AEDPA, as *Richter* and *Williams* hold, then it must be the state court's judgment, rather than its reasoning, to which the federal courts owe deference. Accordingly, in any case, whether the habeas petitioner can show that the state court's *judgment* sustaining the state conviction is "contrary to clearly established Federal law" should be "the only question that matters under § 2254(d)(1)." *Lockyer* v. *Andrade*, 538 U.S. 63, 71 (2003).

Here, there is no question that the California Supreme Court's judgment was based on consideration of the merits of respondent's claim, rather than on some procedural default or non-merits bar. *See* Pet. 16-17. The state court acknowledged the presentation of a federal claim under *Batson* v. *Kentucky*, 476 U.S. 79 (1986); expressly noted the fact that this Court had declined to mandate particular procedures for implementing *Batson*; and ultimately concluded that any potential federal error under *Batson* during the jury selection for respondent's trial was, on the extensive record before the court, harmless beyond a reasonable doubt. Pet. App. 198a-199a, 203a. As Judge Callahan observed in dissent, "although there may be some question as to whether the California Supreme Court actually found that there was a federal error, it clearly addressed Ayala's federal claim in determining that whatever federal error occurred, it was harmless as a matter of federal law." *Id.* at 80a. Under these circumstances, the state court's determination of harmlessness was an

adjudication of respondent's federal claim on the merits within the meaning of § 2254(d).

2. As the petition explains (at 20-22), the Ninth Circuit's contrary conclusion in this case conflicts directly with the Tenth Circuit's decision in *Littlejohn* v. *Trammell*, 704 F.3d 817, 850 n.17 (10th Cir. 2013). When Judge Ikuta's dissent from the denial of rehearing en banc in the court of appeals pointed out this conflict, the panel majority declined to offer any response. *See* Pet. 22. Respondent adopts the same approach, not even citing *Littlejohn* in his brief in opposition—let alone attempting to distinguish the case or refute its reasoning. Meanwhile, since the filing of the petition, a divided panel of the Sixth Circuit has joined the Ninth in holding that a state court conclusion that any federal error was harmless is not "an adjudication on the merits for the purposes of § 2554(d)'s relitigation bar." *McCarley* v. *Kelly*, ___ F.3d ___, 2014 WL 3360833 (6th Cir. July 10, 2014); *see id.* at *13 (Daughtrey, J., dissenting on this point). Relying on *Ayala*, the Sixth Circuit, too, simply ignores *Littlejohn*: "Like the Ninth Circuit in *Ayala v. Wong*, 'We have found no published opinion in which, after a state court has denied relief based on harmless error, a federal court has presumed that the state court adjudicated the merits of the question of error.'" *Id.* at *6 (citation omitted); *compare Littlejohn*, 704 F.3d at 850 n.17 ("Where a state court assumes a constitutional violation in order to address whether the defendant was actually harmed by the violation, as here, the state court takes the claim on the merits; it just disposes of it on alternative *merits*-based reasoning.").[1] The deepening division in the courts of

[1] The current Westlaw version of the Sixth Circuit's opinion in *McCarley* cites to the pre-amendment version of the Ninth Circuit's decision in *Ayala*, and cites that version to (continued...)

appeals on this recurrent question underscores the need for this Court's review.

Respondent does cite three decisions of this Court that he contends support the Sixth and Ninth Circuits' side of this debate: *Wiggins* v. *Smith*, 539 U.S. 510, 534 (2003); *Rompilla* v. *Beard*, 545 U.S. 374, 390 (2005); *Porter* v. *McCollum*, 558 U.S. 30, 39 (2009). *See* Opp. 22, 30-33; *see also* Pet. App. 19a-21a. In *Rompilla* and *Wiggins*, this Court concluded under AEDPA that state courts had "unreasonably applied" the clearly established framework of *Strickland* v. *Washington*, 466 U.S. 668 (1984), when they rejected claims of constitutionally deficient performance by counsel. The Court then analyzed *de novo* the prejudice component of the *Strickland* test, which the state courts had not reached. *See Rompilla*, 545 U.S. at 389-390; *Wiggins*, 539 U.S. at 534. In *Porter*, the Court similarly reviewed the deficient-performance component of a *Strickland* claim *de novo* after concluding that the state court had unreasonably applied established law in rejecting the claim on lack-of-prejudice grounds. *Porter*, 558 U.S. at 31, 39.

Wiggins, *Rompilla*, and *Porter* all differ from this case (and from *Littlejohn* and *McCarley*) because they involved the application to particular sets of facts of a constitutional test that all acknowledged was "clearly established Federal law" for purposes of determining whether a constitutional violation occurred. In each case the question was whether the state court's application of one component of that test to the facts of the case before it was "unreasonable" within the

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(...continued)
volume 720 rather than 730 of the Federal Reporter. The language quoted by the Sixth Circuit may be found at Pet. App. 18a, and in the final version of the Ninth Circuit's decision at 756 F.3d 656, ___, 2014 WL 707162, *7.

meaning of Section 2254(d)(1), and this Court concluded that it was. *See Wiggins*, 539 U.S. at 520-521, 534; *Rompilla*, 545 U.S. at 380, 390; *Porter*, 558 U.S. at 44. The state courts had not applied the other component of the test, and this Court undertook to do so itself. That approach might have made practical sense in the specific context of those cases. It does not make sense where a state court has determined that a claimed federal error, if it occurred, was harmless, and the question on federal habeas review is not application of a clearly established rule to particular facts but whether a claimed federal rule is "clearly established" in the first place.

Moreover, *Wiggins*, *Rompilla*, and *Porter* were all decided before *Richter* and *Williams*, and none of them actually analyzed what standard of review was appropriate under AEDPA where a state court had occasion to address only one aspect of a federal claim. To the extent the analysis in this Court's later decisions raises questions about an issue addressed only implicitly or in passing in the *Wiggins* cases, that simply underscores the need for further review. *See, e.g.*, Brian R. Means, Postconviction Remedies § 29.4 (4th ed. 2014).

3. Respondent appears to suggest that applying the proper AEDPA standard of review would make no difference in this case because respondent had a "clearly established" right to have his counsel present at each colloquy in which the trial court asked the prosecutor to explain his peremptory challenges. Opp. 16-21. That is not correct. Certainly, the Sixth Amendment guarantees a criminal defendant the right to have counsel present at all critical stages of an adversarial criminal proceeding. *Montejo* v. *Louisiana*, 556 U.S. 778, 786 (2009) (citing *United States* v. *Wade*, 388 U.S. 218, 227-228 (1967)); *Powell* v. *Alabama*, 287 U.S. 45, 57 (1932). This Court has

recognized voir dire as a "critical stage" of the proceedings. *Gomez* v. *United States*, 490 U.S. 858, 873 (1989). And respondent's counsel was present for, and participated actively in, the voir dire in this case. He was excluded only from the prosecutor's proffers of race-neutral reasons for his challenges. The California Supreme Court held that, absent special circumstances, that exclusion was state-law error; and the State does not contend here that it was or is a desirable practice. But no decision of this Court has ever held that such an exclusion is federal constitutional error. Absent a square holding by the Court to that effect, under § 2254(d) a federal court may not set aside respondent's state conviction as "contrary to ... clearly established Federal law." *See, e.g.*, *Carey* v. *Musladin*, 549 U.S. 70, 74 (2006).

Indeed, as the California Supreme Court noted in considering respondent's claims, this Court expressly declined to prescribe particular procedures for state courts to follow in implementing *Batson*. *See* Pet. App. 198a; *Batson*, 476 U.S. at 99 & n.24. As the petition explains (at 19), the Sixth and Seventh Circuits have expressly permitted *ex parte Batson* proceedings. And in *Georgia* v. *McCollum*, 505 U.S. 42, 58 (1992), this Court observed that such proceedings are permissible at least "[i]n the rare case in which the explanation for a challenge would entail confidential communications or reveal trial strategy." Here, while the state court concluded that *ex parte* proceedings should only be employed for reasons more compelling than those established by the record in this case, no authority compelled it to conclude that the exclusion here necessarily violated respondent's federal rights. *See* App. 76a-80a (Callahan, J., dissenting) (rule not dictated by precedent for purposes of *Teague* v. *Lane*, 489 U.S. 288 (1989)). For the same reason, a federal habeas court could not

properly conclude that a state judgment affirming respondent's conviction in the face of that federal claim must be "so lacking in justification" that it can only reflect "an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 131 S. Ct. at 786-787.

4. Finally, respondent defends the Ninth Circuit's conduct of its own harmless error review under *Brecht* v. *Abrahamson*, 507 U.S. 619, with no regard at all for the California Supreme Court's careful review of the record and reasoned conclusion that any federal error was harmless beyond a reasonable doubt. Opp. 26-37. As the petition explains (at 23-27), however, the utterly non-deferential review undertaken by the federal court of appeals in this case cannot be what Congress and this Court intended in framing and construing AEDPA.

In *Fry* v. *Pliler*, 551 U.S. at 119, this Court first restated its conclusion in *Mitchell* v. *Esparza*, 540 U.S. 12 (2003), that a federal court may grant habeas relief only if a state court's own harmless error determination was objectively unreasonable. The Court then reasoned that if a state court was required to apply *Chapman* v. *California*, 386 U.S. 18 (1967), and conclude that a federal constitutional error was harmless beyond a reasonable doubt, then even deferential AEDPA review of that conclusion would be "more liberal" to habeas petitioners than a federal court's instead considering, under *Brecht*, whether the record demonstrated "actual prejudice." *See Fry*, 551 U.S. at 119-120. On that ground the Court concluded that use of the *Brecht* standard would be more appropriate under AEDPA, because that Act was intended to limit, not expand, the proper grounds for habeas relief. *Id.* *Fry* likewise reiterated concerns raised in *Brecht* regarding the finality of state court

judgments and the difficulty of retrying defendants many years after their crimes, emphasizing again that "'[s]tate courts are fully qualified to identify constitutional error and evaluate its prejudicial effects on the trial process and often occupy a superior vantage point from which to evaluate the effect of trial error.'" *Id.* at 118 (quoting *Brecht*, 507 U.S. at 636).

In light of that reasoning, *Fry* cannot have been intended to authorize the sort of harmless error review undertaken by the Ninth Circuit panel majority in this case. On the contrary, if *Fry* and *Brecht* are applied as the court of appeals applied them here, then the central reform of AEDPA—deference to reasonable state court decisions—has simply vanished when the determination in question is one of harmless error.

To be clear, the State understands the logical sense in which the *Brecht* standard could be thought to "subsume[]" even deferential review of a state court determination applying the more stringent *Chapman* standard. As a practical matter, however, that is often not how lower federal courts understand their mandate under *Fry* and *Brecht*. This case is a good example of the phenomenon. *See, e.g.*, Pet. App. 186a (Ikuta, J., dissenting from denial of rehearing en banc) ("[T]he panel majority engages in not just de novo legal analysis, but de novo review of the record that piles speculation upon speculation instead of giving due deference to the finder of fact."). Accordingly, it is also a particularly good vehicle for review of the question whether a state court's determination of harmlessness is an "adjudicat[ion] on the merits" under AEDPA. The careful harmlessness review undertaken by the California Supreme Court, combined with the thorough second-guessing of that decision by the federal court of

appeals, present the "adjudication" question in sharp relief. And even if the court of appeals properly reached the prejudice question, the way it addressed that question aptly illustrates the need for further guidance from this Court concerning how to apply *Brecht* in a case otherwise subject to AEDPA deference.

CONCLUSION

The petition for a writ of certiorari should be granted.

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JOINT APPENDIX

No. 13-1428

In The Supreme Court of the United States

KEVIN CHAPPELL, WARDEN

v.

HECTOR AYALA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

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The following items are not reproduced in the joint appendix, because they have already been reproduced in the appendix to the petition for a writ of certiorari, at the pages indicated:

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DISTRICT COURT ORDER DENYING
PETITIONER'S MOTION FOR SUMMARY JUDGMENT
ON GROUP 2 CLAIMS AND DENYING REQUEST
FOR EVIDENTIARY HEARING;
GRANTING RESPONDENT'S MOTION FOR
SUMMARY JUDGMENT ON GROUP 2 CLAIMS
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NINTH CIRCUIT ORDER DENYING
PETITION FOR REHEARING EN BANC;
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Filed February 25, 2014 ..... 172a

NINTH CIRCUIT AMENDED OPINION
Ayala v. Wong
Case No. 09-99005
Filed September 13, 2013
Amended February 25, 2014 ..... 1a

CALIFORNIA SUPREME COURT
People v. Ayala (Hector Juan)
Case No. S013188

RELEVANT DOCKET ENTRIES*

DATE	DESCRIPTION	NOTES
11/30/1989	Judgment of Death	
* * * * *		
08/28/2000	Opinion filed: Judgment affirmed in full	Majority Opinion by Mosk J. ---- joined by Baxter, Werdegar, Chin & Brown JJ. Dissenting opinion by George, C.J.---- joined by Kennard, J.

*Entries edited for clarity

UNITED STATES DISTRICT COURT—
SOUTHERN DISTRICT OF CALIFORNIA
Ayala v. Ornoski
Case No. 3:01-cv-01322-IEF-PCL

RELEVANT DOCKET ENTRIES*

DATES	DESCRIPTION
Filed: 05/14/2002 Entered: 05/15/2002	Petition for Writ of Habeas Corpus
* * * * *	
Filed: 12/09/2004 Entered: 12/10/2004	[Third Amended] Petition for Writ of Habeas Corpus
* * * * *	
Filed: 02/11/2005 Entered: 02/14/2005	Answer [to Petitioner's Third Amended Petition for Writ of Habeas Corpus]
* * * * *	
Filed: 08/02/2005	Scheduling Order [Separating claims raised in Petitioner's Third Amended Petition for Writ of Habeas Corpus into six groups for further briefing and argument. *Batson* claim comes within Group 2.]
* * * * *	

Filed: 04/17/2006 Entered: 04/18/2006 Terminated: 10/23/2006	Motion to Dismiss [Respondent's Notice of Motion and Motion to Dismiss Group 2 Claims]

* * * * *

Filed: 05/04/2006 Entered: 05/05/2006 Terminated: 10/23/2006	Motion for Summary Judgment [Petitioner's Notice of Motion for Summary Adjudication of Group 2 Claims]

* * * * *

Filed: 06/09/2006 Entered: 06/12/2006	Response in Opposition to Motion [Respondent's Opposition to Petitioner's Motion for Summary Adjudication of Group 2 Claims]
Filed: 06/09/2006 Entered: 06/13/2006	Response in Opposition to Motion [Opposition to Respondent's Motion for Summary Adjudication of Group 2 Claims]
Filed: 06/28/2006 Entered: 06/30/2006	Reply to Response to Motion [Respondent's Reply Brief in Support of Motion for Summary Adjudication of Group 2 Claims]
Filed: 06/30/2006 Entered: 07/06/2006	Reply to Response to Motion [Petitioner's Reply Brief in Support of Motion for Summary Adjudication of Group 2 Claims]

* * * * *

Filed: 08/15/2006 Entered: 08/16/2006	Minutes –Miscellaneous [Motions Hearing—Motion to Dismiss and Motion for Summary Adjudication of Group 2 Claims submitted]

* * * * *

Filed: 10/23/2006 Entered: 10/24/2006	Order on Motion to Dismiss [Order Denying Petitioner's Motion for Summary Judgment on Group 2 Claims and Denying Request for Evidentiary Hearing . ; Granting Respondent's Motion for Summary Judgment on Group 2 Claims]
Filed & Entered: 11/06/2006 Terminated: 12/19/2006	Motion for Reconsideration [Petitioner's Memorandum of Points and Authorities in Support of Motion for Reconsideration of Order Denying Petitioner's Motion for Summary Judgment on Group 2 Claims]

* * * * *

Filed & Entered: 11/15/2006	Response in Opposition to Motion [Respondent's Opposition to Petitioner's Motion for Reconsideration of Order Granting Summary Adjudication of Group 2 Claims]

* * * * *

Filed & Entered: 11/27/2006	Reply—Other [Reply to Respondent's Opposition to Petitioner's Motion for Reconsideration of Order Granting Summary Adjudication of Group 2 Claims]
* * * * *	
Filed & Entered: 12/19/2006	Order on Motion for Reconsideration [Order Denying Motion for Reconsideration [Doc. No. 185] on Group 2 Claims]
* * * * *	
Filed & Entered: 02/17/2009	Clerk's Judgment [Third Amended Petition for Writ of Habeas Corpus DENIED as to all claims]
Filed: 03/13/2009 Entered: 03/16/2009	Notice of Appeal to 9th Circuit
* * * * *	
Filed & Entered: 04/17/2009 Terminated: 05/13/2009	Motion for Certificate of Appealability [Order Granting in Part and Denying in Part Petitioner's Application for a Certificate of Appealability and Issuing a Limited COA]

*Entries edited for clarity

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
Hector Ayala v. Robert Wong
Case No. 09-99005

RELEVANT DOCKET ENTRIES*

DATE	DESCRIPTION
05/22/2009	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. (COA Granted in Part and Denied in Part in USDC on 5/13/09)
02/09/2012	ARGUED AND SUBMITTED TO STEPHEN R. REINHARDT, KIM MCLANE WARDLAW and CONSUELO M. CALLAHAN.
08/29/2012	FILED OPNION (STEPHEN R. REINHARDT, KIM MCLANE WARDLAW and CONSUELO M. CALLAHAN) REVERSED AND REMANDED. Judge: SR Authoring, Judge: CMC Dissenting. FILED AND ENTERED JUDGMENT.
* * * * *	
09/12/2012	Filed Appellee Robert K. Wong petition for panel rehearing and petition for rehearing en banc (from 08/29/2012 opinion).
* * * * *	
01/24/2013	Filed order (STEPHEN R. REINHARDT, KIM MCLANE WARDLAW and CONSUELO M. CALLAHAN): Consideration of the petition for rehearing and rehearing en banc is deferred pending decision by the Supreme Court of Johnson v. Williams, Supreme Court No. 11-465.

09/13/2013	Filed Order for PUBLICATION (STEPHEN R. REINHARDT, KIM MCLANE WARDLAW and CONSUELO M. CALLAHAN) The opinion in this case filed on August 29, 2012, and reported at 693 F.3d 945 is hereby withdrawn. The opinion shall not be cited as precedent by or to any court of the Ninth Circuit. As the court's opinion is withdrawn, the state's petition for rehearing and rehearing en banc is moot. A new opinion will be filed shortly.
09/13/2013	FILED OPINION (STEPHEN R. REINHARDT, KIM MCLANE WARDLAW and CONSUELO M. CALLAHAN) REVERSED AND REMANDED. Judge: SR Authoring, Judge: CMC Dissenting. FILED AND ENTERED JUDGMENT.
* * * * *	
09/26/2013	Filed . Appellee Robert K. Wong petition for rehearing en banc (from 09/13/2013 opinion).
* * * * *	
02/25/2014	Filed order and amended opinion (STEPHEN R. REINHARDT, KIM MCLANE WARDLAW and CONSUELO M. CALLAHAN). (Dissent to Order by Judge Ikuta; Opinion by Judge Reinhardt; Dissent by Judge Callahan) Amending Disposition Opinion REVERSED AND REMANDED; The opinion and dissenting opinion, filed on September 13, 2013, and published at 730 F.3d 831, are replaced by the amended opinion and amended dissenting opinion filed concurrently with this Order. Judges Reinhardt and

Wardlaw voted to deny the petition for rehearing en banc. Judge Callahan voted to grant the petition. A judge requested a vote on whether to rehear this matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35. The request for rehearing en banc is DENIED. No further petitions will be entertained. Judge Ikuta's dissent from denial of rehearing en banc is filed concurrently with this Order.

*Entries edited for clarity

San Diego County Superior Court
People v. Hector Juan Ayala
Case No. CR 78077

[26 CT 5578-5591]

JUROR QUESTIONNAIRE

PLEASE MAKE CERTAIN YOUR ANSWERS ARE LEGIBLE

1. Full name: Leona Evelyn *Bon Durant*
2. Date and place of birth: March 12, 1924 San Diego, Ca
3. In what area do you currently live (not specific address): Pt. Loma
4. Current occupation and employer: church secretary Pacific Beach Christian Church
5. What are your main duties: office administration, coordinate programs,

   What types of jobs have you held in the past 10 years? just this one
6. If you are retired, what was your previous occupation? —
7. Have you or your spouse ever been in the Armed Forces? yes

   If so, what branch: USMC

   Highest rank: Cpl When? WWII

   Where did ~~you~~ spouse serve: Continental U.S.

   What were ~~your~~ his duties: Electronics
8. How many years of school did you attend? Check one.

   _____ Some high school.

   ✓ Graduated from high school.

   _____ Some college.

   _____ Graduated from (name of college)

   Major and type of degree

_____ Post-graduate course work and/or degree

Major and type of degree

Have you ever received any vocational training. If so, describe. Secretarial school

9. What is your current marital status?

Single and never married ___

Single, but married in the past for ___ years.

Currently married and have been for 41+ years.

Living with non-married mate for ___ years

Widow/Widower ___

Other

10. Do you have any children: Yes ✓ No ___

If so, please list as to each child: NAME SEX AGE EDUCATION OCCUPATION DOES CHILD LIVE W/YOU

Evelyn Beattie F 48 H.S. rehab.ward clerk yes

Peggy Bon Durant F 44 A.A. secy no

Robert Bon Durant M 40 DVM Assoc. Prof. U.C. Davis no

Wm Bon Durant M 34 MS U.C.S.B. PHD Candidate no

11. Information about Spouse (if you are living with someone but are unmarried, please complete this question as well):

a. Where was your spouse born: Maryland

b. Occupation: Energy Engr

c. Name and location of spouse's current employer: self

d. Length of employment by current employer: 2 mo

e. Job description: consultant

f. How many years of school does he/she have? Check one.

_____ Did not graduate from high school.

_____ Graduated from high school.

_____ Attended college, but did not obtain a college degree.

_____ Graduated from college.

__✓__ Post graduate course work and/or degree.

g. Has he/she any law enforcement experience (including military police)?

Yes _____ No __✓__ If yes, what was that experience?

h. If he or she is retired, what was his or her previous occupation?

i. Does your he/she have any medical or legal training?

Yes _____ No __✓__ If yes, please describe.

12. How many brothers and sisters do you have? one — half brother

BROTHERS			SISTERS		
Name	Age	Occupation	Name	Age	Occupation
Tony Mansell	70	ret			

13. Are any of your immediate family members deceased, such as mother, father, brother, sister, children? Yes __✓__ No _____

If yes, please give date and the circumstances of death. mother – 1944 – natural causes, father – 1948 – natural causes

14. How often do you see/visit with your parents? —

How often do you see/visit with your brothers and/or sisters? once in about 3 years

15. Have you or anyone close to you had any legal training or worked in an office dealing with legal matters? Yes _____ No ✓ If yes, describe:

16. Have you or any member of your immediate family ever been inlvolved as a plaintiff or a defendant in a lawsuit? Yes _____ No ✓

If yes, what kind of lawsuit?

17. Have you or any close friends or relatives ever been employed by, or otherwise affiliated with, a law enforcement agency? (This includes police, sheriff, F.B.I., Highway Patrol, Drug Enforcement Administration, District Attorney, state prisons or county jails, Attorney General, United States Attorney, Immigration and Naturalization Service, United States Customs, Military Police, etc.)

Yes ✓ No _____

If yes, what agency? Father was S.D.P.D. until his death in 1948.

Have you ever wanted to work in law enforcement? Yes _____ No ✓

If yes, please describe:

18. Do you know any attorneys or judges? Yes ✓ No _____

Who? Leland Nielsen

Nature of the relationship: casual acquaintance

19. Have you, any relative or close friend ever been a witness to a crime? Yes _____ No ✓

If yes, please explain:

20. Have you or anyone close to you ever been the victim of a crime whether reported to police or not? Yes _____ No ✓

If yes, please explain:

21. Whether or not you considered it a crime, have

you or anyone close to you ever been verbally or physically assaulted by anyone including a stranger, family member or friend? Yes _____ No ✓

If yes, please explain:

22. Have you ever had any direct contact with the police (victim, witness, suspect, traffic accident, traffic citation, etc.)? Yes ✓ No _____

If yes, what type of contact was it? traffic tickets (2), both more than 10 years ago, I think.

What was the outcome? Pd fine

23. Have you ever had any positive experiences with police officers?

Yes ✓ No _____ If yes, please describe. found lost child, one is personal friend.

24. Have you ever had any negative experiences with police officers?

Yes ✓ No _____ If yes, please describe. Arrogant training officer who answered my call from the church for someone to transport a person to [*illegible*] he was showing off for his pupil.

25. Have you previously served on jury duty? Yes _____ No ✓

If yes, list all cases below:

Please provide the following information about about each case:

Criminal Or Civil Charges/Issues
Name of case Where served When served
Did jury reach verdict

26. Have you eyer been selected as a foreperson of any jury?

Yes _____ No ✓

27. Have you ever belonged to any organized civic, social, political, sporting or religious organization. If so, please explain the type of organization any office you may have held. Little League, Pony League, Colt League official scorer & board member —, Church Women United, Republican Party, Pacfic Beach Christian Ch: (see explanation page)

28. Please describe you hobbies or special interests. church, music, grandchildren

29. How do you get your news?

Newspapers ✓ Which ones? S.D. Union How often? daily Television ✓ Which channels? 8 How often? daily Radio ✓ Which stations? KFMB, KSDO How often? daily

30. Have you ever written a "letter to the editor"?

Yes _____ No ✓

If yes, on what subject?

31. Have you had any experience with:

a. prosecutors (district attorneys)? Yes _____ No ✓

If yes, please explain:

b. criminal defense lawyers? Yes _____ No ✓

If yes, please explain:

32. Do you have any specific biases for or against:

(a. criminal defense lawyers?

(b. prosecutors (district attorneys)?

(c. law enforcement officials (police officers, sheriffs, probation officers, etc.)

(> Not any of which I'm aware

33. Do you or any member of your immediate family own or keep any weapons?

Yes ✓ No ____

If yes, please state:

Type of weapon(s): longbow – belongs to live-in grandson

Intended purpose: target shooting

Have you ever used any weapon(s) longbow – in highschool

Do you or any member of your immediate family belong to any organizations associated with firearms such as the NRA and, if so, which ones: No

Have you or any family member ever been injured by a gun?

Yes ____ No ✓

If yes, what happened:

34. Do you have any serious health problems? Yes ____ No ✓

If yes, please state:

The nature of your problem

The length of time you have suffered from this problem

What medication are you taking?

35. What is the condition of your hearing? somewhat impaired but assisted by hearing aid

36. Do you have any specific problems at home or at work that might interfere with your duties as a juror during the trial? No, but the opposite is certainly true.

37. Have you heard or read anything about this case? Yes

38. What have you read or heard? I can't remember. Only that the name "Ayala" seems to ring a bell.

When? It must have been some time ago.

39. What is your best recollection of how you heard or read about this case? Probably newspaper & television

What did you think or feel when you heard or read this? Don't recall

40. Do you have any bumper stickers or "message" license plate holder or personalized license plates on your car or other cars in your family? Yes _____ No _____

If yes, what is it? "Yosemite" "O.B."

41. a. What are your current favorite television programs? "Natl Geographic", "MacGuyver" – live baseball & football

b. Please name the three public figures you admire most? Pres Reagan, Barbara Bush, Billy Graham

42. What is the most important value a parent can teach a child as he/she is growing up? - that "I am Third", God is First, others next, I am third.

43. How do you feel about the way the criminal justice system deals with crime? I feel that convicted criminals are often returned to society after little-or-no rehabilitation and that this accounts for the recidivism percentage being so high

44. What do you feel is the major cause of crime in our society? Lack of moral values in society as a whole

45. What qualities do you feel are most important in sitting as a juror on a criminal case? dispassionate honest attention to evidence alone

46. Do you feel you are usually able to determine when a lie is being told to you? Yes _____ No ✓

47. Have you, any family member or any friend ever consulted a psychiatrist, a psychologist or a counselor? Yes ✓ No _____

1) Please explain circumstances. grandchildren, five years ago after being frightened by their father

2) Have you or your spouse ever studied psychiatry, psychology or related subjects? Yes _____ No ✓

48. What is your ethnic and racial background (optional)? melting pot – nearly all Caucasian, some native Americ

49. Have you or has any member of your family ever experienced racial prejudice? Yes ✓ No _____ If yes, please explain. Dau.-in-law is of Japanese extraction – Family "relocated" in WWII

50. What is the racial make-up of your neighborhood? almost entirely Caucasian

51. Do you speak a language other than English? Yes _____ No ✓

If yes, please. state which language(s), how fluent you are and how you learned the language(s). a few words of bad Spanish

52. When you hear the word "gang" what do you think of? street-kids

53. What do you know about gangs? Only what "West Side Story" portrayed, & some "News" on TV.

Please explain and state what is your source of information? (e.g. television, movies) The [*two words illegible*] gangs, and the news media goes for the "grabber", exploiting *anything!*

54. What impressions or feelings do you have about gangs based upon what you read or saw? That not enough people know or care where their kids are, when they're young enough to mold.

55. Have you or anyone close to you had any personal experience with gangs? no

If yes, please explain.

56. Why do you think people join gangs on the street or in prison? to "belong" to someone or something.

57. Have you or anyone you know had a problem with drugs and/or alcohol? Yes ✓ No ____

If yes, please explain: father was a functioning alcoholic. Have also dealt with alcoholics and addicts *a little* in the church

58. What have you read or heard about heroin or cocaine? - that they are addictive, harmful.

59. Do you know anyone who has used drugs such as heroin or cocaine? Yes ✓ No ____

60. Do you know anyone who has been treated for drug abuse? Yes ✓ No ____

61. What are your sources of information about heroin? Please describe. news magazines, speakers, TV, radio

62. How do you feel about the use of alcohol? It is abused too often by too many.

63. Do you drink alcohol? Yes ✓ No ____

64. Do you associate with people who drink? Yes ✓ No ____

65. If you do not drink, is this because of personal or religious preferences or beliefs? I will drink a toast at a wedding or holiday. But I really don't like the stuff, so it's very easy to be "moral" about it.

66. When the government accuses someone of a crime, it is then up to the government, through the district attorney, to prove the defendant guilty beyond a reasonable doubt. Do you believe that this form of prosecution is fair to both sides? yes

67. Please state your personal belief regarding each of these statements.

a. The defendant is innocent until proven guilty beyond a reasonable doubt. This is a basic right under our form of government.

b. If the prosecution goes to the trouble to bring someone to trial, the person is probably guilty of the charges. Not necessarily

c. Regardless of what the law says, a defendant in a criminal trial should be required to prove his or her innocence. no

d. The accused should be required to testify as a witness before he can be found not guilty. no

e. The accused should *not* be required to testify as a witness before he can be found not guilty. yes

As the judge in this case, I want to ask you some questions regarding your feelings about the death penalty because if Mr. Ayala is convicted of the charges, it is one of the possible punishments he could receive. The other possible punishment is life in prison without the possibility of parole. *By asking these questions I am not suggesting that you will ever need to decide the issue of punishment. I have no way of knowing what the evidence will be in this case or whether you will find Mr. Ayala guilty of anything at all. Mr. Ayala is presumed innocent unless and until proven guilty beyond a reasonable doubt.*

68. Are you a member of a group, religious body, or religious organization which has among its tenants either the use of, or the prohibition against, the death penalty?

Yes _____ No ✓ If so, please explain:

69. What are your feelings about the death penalty? I feel that, under certain circumstances it should be used.

70. Have your feelings on the death penalty changed in the last ten years?

Yes _____ No ✓

If yes, in what way?

71. Do you feel that the death penalty is used:

_____ Too often _____ Too seldom

Please explain: I can't say, not having heard the evidence in any case, but having to depend on news media.

72. What does the penalty of "life in prison without possibility of parole" mean to you? Exactly that – that the one sentenced will always be in custody as along as he/she lives.

73. Do you believe in the adage, "An eye for an eye"? no

1. What does that belief mean to you? That forgiveness is not possible

2. How strong is that belief? My own belief is quite strong.

3. If your view based on religious convictions? Yes ✓ No _____

74. Are there any type of crimes for which you feel the death penalty should always be imposed? Probably when a "capital" crime is committed by one already serving the otherwise maximum sentence.

75. As a result of your having been asked to fill out this questionnaire, have you now formed any opinion about this case? If so, please explain. I don't believe I have.

76. After having completed this questionnaire, is this a case in which you would like to serve as a juror and why? I feel that serving on any jury is an awsome responsibility, and not to be liked or disliked.

77. Is there anything else you feel we need to know about you regarding your jury service in this case? I am hearing-impaired, but am hearing-assisted as well.

EXPLANATION SHEET

If you feel that in the spaces provided you were unable to sufficiently answer any particular question, please use this sheet to provide that information. Additionally, please use this page to make note by number of any questions you did not understand or which concern topics of a particularly personal or sensitive nature to you.

27 P.B. Christian Ch:

offices held:

S.S teacher

Deaconess

*Elder

CWF Pres.

*Chair: Hospitality Comm.

Chair: 25th Anniversary Com

*Chair: 45th " "

* Present

San Diego County Superior Court
[Title Omitted in Printing]

[26 CT 6512-5625]

JUROR QUESTIONNAIRE

PLEASE MAKE CERTAIN YOUR ANSWERS ARE LEGIBLE

1. Full name: Thomas Alan Bone
2. Date and place of birth: March 15, 1964 Marion, Indiana
3. In what area do you currently live (not specific address): Escondido
4. Current occupation and employer: Technician at Northern Telecom
5. What are your main duties: Perform routine maintenance on production equipment

   What types of jobs have you held in the past 10 years? Electronics, Baker, Sales
6. If you are retired, what was your previous occupation?
7. Have you or your spouse ever been in the Armed Forces? No

   If so, what branch:

   Highest rank: When?

   Where did you serve:

   What were your duties:
8. How many years of school did you attend? Check one.

   _____ Some high school.

   _____ Graduated from high school.

   __✓__ Some college.

   _____ Graduated from (name of college)

   Major and type of degree

_____ Post-graduate course work and/or degree

Major and type of degree

Have you ever received any vocational training. If so, describe. 2 year degree @ ITT Technical Institute (Electronics Eng)

9. What is your current marital status?

Single and never married ✓

Single, but married in the past for ___ years.

Currently married and have been for ___ years.

Living with non-married mate for ___ years

Widow/Widower ___

Other

10. Do you have any children: Yes ___ No ✓

If so, please list as to each child: NAME SEX AGE EDUCATION OCCUPATION DOES CHILD LIVE W/YOU

_____

11. Information about Spouse (if you are living with someone but are unmarried, please complete this question as well):

a. Where was your spouse born:

b. Occupation:

c. Name and location of spouse's current employer:

d. Length of employment by current employer:

e. Job description:

f. How many years of school does he/she have? Check one.

_____ Did not graduate from high school.

_____ Graduated from high school.

_____ Attended college, but did not obtain a college degree.

_____ Graduated from college.

_____ Post graduate course work and/or degree.

g. Has he/she any law enforcement experience (including military police)?

Yes _____ No _____ If yes, what was that experience?

h. If he or she is retired, what was his or her previous occupation?

i. Does your he/she have any <u>medical</u> or <u>legal</u> training?

Yes _____ No _____ If yes, please describe.

12. How many brothers and sisters do you have? <u>0</u>

BROTHERS SISTERS

Name Age Occupation Name Age Occupation

13. Are any of your immediate family members deceased, such as mother, father, brother, sister, children? Yes _____ No <u>x</u>

If yes, please give date and the circumstances of death.

14. How often do you see/visit with your parents? <u>Semi-annually</u>

How often do you see/visit with your brothers and/or sisters?

15. Have you or anyone close to you had any legal training or worked in an office dealing with legal matters? Yes _____ No <u>x</u> If yes, describe:

<u>16.</u> Have you or any member of your immediate family ever been inlvolved as a plaintiff or a defendant in a lawsuit? Yes _____ No _____

If yes, what kind of lawsuit? I do not understand! I was in a custody suit when I was a child. I do not know if a lawsuit and custody suit are the same thing.

17. Have you or any close friends or relatives ever been employed by, or otherwise affiliated with, a law enforcement agency? (This includes police, sheriff, F.B.I., Highway Patrol, Drug Enforcement Administration, District Attorney, state prisons or county jails, Attorney General, United States Attorney, Immigration and Naturalization Service, United States Customs, Military Police, etc.)

Yes _____ No _x_

If yes, what agency?

Have you ever wanted to work in law enforcement? Yes _____ No _x_

If yes, please describe:

18. Do you know any attorneys or judges? Yes _____ No _x_

Who?

Nature of the relationship:

19. Have you, any relative or close friend ever been a witness to a crime? Yes _x_ No _____

If yes, please explain: I witnessed somebody breaking into my vehicle from my bedroom window.

20. Have you or anyone close to you ever been the victim of a crime whether reported to police or not? Yes _x_ No _____

If yes, please explain: When I was a child living in Indiana, we returned from vacation to find our home burglerized.

21. Whether or not you considered it a crime, have you or anyone close to you ever been verbally or physically assaulted by anyone including a stranger, family member or friend?

Yes _x_ No _____

If yes, please explain: Verbally assaulted in high school by oppossing members of a visiting sports team.

22. Have you ever had any direct contact with the police (victim, witness, suspect, traffic accident, traffic citation, etc.)?
Yes _x_ No _____

If yes, what type of contact was it? Traffic Citations

What was the outcome? (1) Payed the fine, (2) challenged and won.

23. Have you ever had any positive experiences with police officers?

Yes _x_ No _____ If yes, please describe. I've found whenever 've had dealings with officers, they've always been pleasant!

24. Have you ever had any negative experiences with police officers?

Yes _____ No _x_ If yes, please describe.

25. Have you previously served on jury duty?
Yes _____ No _x_

If yes, list all cases below:

Please provide the following information about about each case:

Criminal Or Civil Charges/Issues
Name of case Where served When served
Did jury reach verdict

26. Have you eyer been selected as a foreperson of any jury?

Yes _____ No _x_

27. Have you ever belonged to any organized civic, social, political, sporting or religious organization. If so, please explain the type of

organization any office you may have held. Junior Achievement in Indiana. Chapter President and delegate to National Convention.

28. Please describe you hobbies or special interests. Outdoors activities, stamp collecting, and sporting events.

29. How do you get your news?

Newspapers Which ones? How often?
Television x Which channels? 7, 8, or 10 How often? 2 times a week Radio Which stations? How often?

30. Have you ever written a "letter to the editor"?

Yes x No _____

If yes, on what subject? Off campus lunch breaks at high school

31. Have you had any experience with:

a. prosecutors (district attorneys)? Yes _____ No x

If yes, please explain:

b. criminal defense lawyers? Yes _____ No x

If yes, please explain:

32. Do you have any specific biases for or against:

a. criminal defense lawyers? No

b. prosecutors (district attorneys)? No

c. law enforcement officials (police officers, sheriffs, probation officers, etc.) Absolutely Not

33. Do you or any member of your immediate family own or keep any weapons?

Yes x No _____

If yes, please state:

Type of weapon(s): Shotguns

Intended purpose: Clay Pigeon and skeet shooting

Have you ever used any weapon(s) Yes

Do you or any member of your immediate family belong to any organizations associated with firearms such as the NRA and, if so, which ones: No

Have you or any family member ever been injured by a gun?

Yes x No _____

If yes, what happened: Uncle accidentally shot himself in foot while hunting in Indiana

34. Do you have any serious health problems? Yes _____ No x

If yes, please state:

The nature of your problem

The length of time you have suffered from this problem

What medication are you taking?

35. What is the condition of your hearing? Excellent

36. Do you have any specific problems at home or at work that might interfere with your duties as a juror during the trial? None at all.

37. Have you heard or read anything about this case? I believe so ~~[illegible] TV story that [illegible] today~~

38. What have you read or heard? I believe I heard a TV story several years ago, but no details or info until today.

When? Several years ago

39. What is your best recollection of how you heard or read about this case? TV story

What did you think or feel when you heard or read this? Unfortunate for victims and family

members of all involved

40. Do you have any bumper stickers or "message" license plate holder or personalized license plates on your car or other cars in your family? Yes _x_ No _____

If yes, what is it? Bruce Springsteen and the E Street Band

41. a. What are your current favorite television programs? "Married with Children" "Moonlighting"

b. Please name the three public figures you admire most? Ronald Reagan, Mikel Gorbachov, Bruce Springsteen

42. What is the most important value a parent can teach a child as he/she is growing up? I believe that honesty is of the utmost importance. With honesty, good things will follow.

43. How do you feel about the way the criminal justice system deals with crime? I feel the system is bogged down with too many caces, not enough legals to work, and not enough honest people to see that justice is served for society

44. What do you feel is the major cause of crime in our society? Morals, little hope, despare, poor social-economic surroundings

45. What qualities do you feel are most important in sitting as a juror on a criminal case? Open minded. Remember "Innocent until *proved* guilty" Remain silent until the time is proper. Try to remain unemotional for or against either side.

46. Do you feel you are usually able to determine when a lie is being told to you? Yes _x_ No _____

47. Have you, any family member or any friend ever consulted a psychiatrist, a psychologist or a counselor? Yes _x_ No _____

1) Please explain circumstances. Counselor in school for class schedule guidance.

2) Have you or your spouse ever studied psychiatry, psychology or related subjects? Yes _____ No _____

48. What is your ethnic and racial background (optional)? White

49. Have you or has any member of your family ever experienced racial prejudice? Yes _x_ No _____ If yes, please explain. ~~Myself and a Black friend~~ See explanation sheet

50. What is the racial make-up of your neighborhood? Evenly mixed with all races

51. Do you speak a language other than English? Yes _x_ No _____

If yes, please. state which language(s), how fluent you are and how you learned the language(s). Spanish – semi-fluently. I understand more than I can speak. Learned through school and society abroad.

52. When you hear the word "gang" what do you think of? A group of individuals, coming together as one.

53. What do you know about gangs? They are often associated with crime by society, and are offen more bag than good.

Please explain and state what is your source of information? (e.g. television, movies) Television

54. What impressions or feelings do you have about gangs based upon what you read or saw? I feel the only media coverage they get is bad, however, those whom do constructive events usually seek out positive media coverage.

55. Have you or anyone close to you had any personal experience with gangs? No

If yes, please explain.

56. Why do you think people join gangs on the street or in prison? They are probably lonely, need assurance for their usually childlike actions

57. Have you or anyone you know had a problem with drugs and/or alcohol? Yes _____ No _x_

If yes, please explain:

58. What have you read or heard about heroin or cocaine? They are drugs which are seriously effecting the way society views morals.

59. Do you know anyone who has used drugs such as heroin or cocaine? Yes _x_ No _____

60. Do you know anyone who has been treated for drug abuse? Yes _x_ No _____

61. What are your sources of information about heroin? Please describe. Media, Medical books, documentarys, Society

62. How do you feel about the use of alcohol? Recreationally acceptable is consumed in limits suitable for all.

63. Do you drink alcohol? Yes _x_ No _____

64. Do you associate with people who drink? Yes _x_ No _____

65. If you do not drink, is this because of personal or religious preferences or beliefs?

66. When the government accuses someone of a crime, it is then up to the government, through the district attorney, to prove the defendant guilty beyond a reasonable doubt. Do you believe that this form of prosecution is fair to both sides? Yes

67. Please state your personal belief regarding each of these statements.

a. The defendant is innocent until proven guilty beyond a reasonable doubt. This was

established by our fore fathers and is a sacred constitutional right which should NEVER change!

b. If the prosecution goes to the trouble to bring someone to trial, the person is probably guilty of the charges. Absolutely not, the person brought to trail may have been at the wrong place at the wrong time. Remember 67a

c. Regardless of what the law says, a defendant in a criminal trial should be required to prove his or her innocence. Absolutely not. This concept is complete backwards. Those who press charges should be responsible for proving guilt

d. The accused should be required'to testify as a witness before he can be found not guilty. In certain circumstances it may only be to the defendants benefit to testify as a witness. After all he needs to clarify where he/she was, what he/she was doing there, etc.

e. The accused should *not* be required to testify as a witness before he can be found not guilty. The defendant should take the stand in order to clarify. If he/she does not than only those who were not around (except the witnesses) will be making conclusions against the defendant.

As the judge in this case, I want to ask you some questions regarding your feelings about the death penalty because if Mr. Ayala is convicted of the charges, it is one of the possible punishments he could receive. The other possible punishment is life in prison without the possibility of parole. *By asking these questions I am not suggesting that you will ever need to decide the issue of punishment. I have no way of knowing what the evidence will be in this case or whether you will find Mr. Ayala guilty of anything at all. Mr. Ayala is presumed innocent unless and until proven guilty beyond a reasonable doubt.*

68. Are you a member of a group, religious body,

or religious organization which has among its tenants either the use of, or the prohibition against, the death penalty?

Yes _____ No __x__ If so, please explain:

69. What are your feelings about the death penalty? If one man can consciously, dilebrately take another life, knowingly aware of the situation at hand, then I feel the death penalty is just punishment.

70. Have your feelings on the death penalty changed in the last ten years?

Yes _____ No __x__

If yes, in what way?

71. Do you feel that the death penalty is used:

_____ Too often __x__ Too seldom

Please explain: To many convicted killers, conscientiously take lives, then live off of society until they themselves die.

72. What does the penalty of "life in prison without possibility of parole" mean to you? Just as it states. "*Life* in *prision without* possibility of parole."

73. Do you believe in the adage, "An eye for an eye"? No

1. What does that belief mean to you? If you do something to someone, ether intentional or not, whether aware or not, whether saine or not, they same must be done to yo.

2. How strong is that belief? I don't understand!

3. If your view based on religious convictions? Yes _____ No __x__

74. Are there any type of crimes for which you feel the death penalty should always be imposed? As previously stated. If a person is aware, sain, conscious, *not acting* in self defense, then

and only then.

75. As a result of your having been asked to fill out this questionnaire, have you now formed any opinion about this case? No If so, please explain.

76. After having completed this questionnaire, is this a case in which you would like to serve as a juror and why? Yes, because I feel I can remain open minded until all the case is in. I have absolutely no prejudices, and can usually tell when somebody not telling the truth. I feel I would represent society well, and can remain unemotional on most all manners.

77. Is there anything else you feel we need to know about you regarding your jury service in this case?

EXPLANATION SHEET

If you feel that in the spaces provided you were unable to sufficiently answer any particular question, please use this sheet to provide that information. Additionally, please use this page to make note by number of any questions you did not understand or which concern topics of a particularly personal or sensitive nature to you.

(49) Once myself and a Black friend entered a resturante in mid-central Indiana for a bite to eat. After receiving no service after an unacceptable amount of time, I questioned the waitress. She said her manager asked her to serve all others before, waiting on a table with a black man. My friend and I discussed this predicament and decided if we were to leave, this could only give justification to those who though of my friend as a "black man." So we decided to wait it out, placed our own meal ticket to the chef. Proudly ate our dinner, paid the establishment with honor, gave our compliments on the quality of the food. Tipped the waitress for good service which we received once our order was in, and left our names and numbers with the manager if he so choosed to discuss his prejudices with us on a intelligent

manner. Later we found this town to be Elwoold, In, the KKK headquarters for the state of Indiana.

San Diego County Superior Court
[Title Omitted in Printing]

[26 CT 5629-5642]

JUROR QUESTIONNAIRE

PLEASE MAKE CERTAIN YOUR ANSWERS ARE LEGIBLE

1. Full name: Charles Marshall Cobleigh
2. Date and place of birth: 30-Jan-1948 Calexico CA
3. In what area do you currently live (not specific address): San Carlos
4. Current occupation and employer: Engineer, TRW, Inc.
5. What are your main duties: Communications Systems Engineering

   What types of jobs have you held in the past 10 years? Systems Engineer, Grad Assistant, Univ Lecturer
6. If you are retired, what was your previous occupation?
7. Have you or your spouse ever been in the Armed Forces? No

   If so, what branch:

   Highest rank: When?

   Where did you serve:

   What were your duties:
8. How many years of school did you attend? Check one.

   _____ Some high school.

   _____ Graduated from high school.

   _____ Some college.

   ✓ Graduated from (name of college) San Diego State

Major and type of degree BSEE

✓ Post-graduate course work and/or degree

Major and type of degree MSEE

Have you ever received any vocational training. If so, describe. No

9. What is your current marital status?

Single and never married ___

Single, but married in the past for ___ years.

Currently married and have been for 18 years.

Living with non-married mate for ___ years

Widow/Widower ___

Other

10. Do you have any children: Yes ___ No ✓

If so, please list as to each child: NAME SEX AGE EDUCATION OCCUPATION DOES CHILD LIVE W/YOU

___

11. Information about Spouse (if you are living with someone but are unmarried, please complete this question as well):

a. Where was your spouse born: Monterrey Park CA

b. Occupation: Teacher

c. Name and location of spouse's current employer: Santee Elem. School Dist

d. Length of employment by current employer: 18 years

e. Job description: Elementary Teacher

f. How many years of school does he/she have? Check one.

___ Did not graduate from high school.

_____ Graduated from high school.

_____ Attended college, but did not obtain a college degree.

__✓__ Graduated from college.

_____ Post graduate course work and/or degree.

g. Has he/she any law enforcement experience (including military police)?

Yes _____ No __✓__ If yes, what was that experience?

h. If he or she is retired, what was his or her previous occupation?

i.Does your he/she have any medical or legal training?

Yes _____ No __✓__ If yes, please describe.

12. How many brothers and sisters do you have? 1 each

BROTHERS			SISTERS		
Name	Age	Occupation	Name	Age	Occupation
Alex	50	Technician	Nancy	55	Housewife

13. Are any of your immediate family members deceased, such as mother, father, brother, sister, children? Yes __✓__ No ___

If yes, please give date and the circumstances of death. Mother died in 1962 of Cancer

14. How often do you see/visit with your parents? Once a month or more often

How often do you see/visit with your brothers and/or sisters? Sister about once a week brother about once a year.

15. Have you or anyone close to you had any legal training or worked in an office dealing with legal matters? Yes __✓__ No _____ If yes, describe: step brother in law is attorney in Riverside.

16. Have you or any member of your immediate family ever been inlvolved as a plaintiff or a defendant in a lawsuit? Yes _____ No ✓

If yes, what kind of lawsuit?

17. Have you or any close friends or relatives ever been employed by, or otherwise affiliated with, a law enforcement agency? (This includes police, sheriff, F.B.I., Highway Patrol, Drug Enforcement Administration, District Attorney, state prisons or county jails, Attorney General, United States Attorney, Immigration and Naturalization Service, United States Customs, Military Police, etc.)

Yes _____ No ✓

If yes, what agency?

Have you ever wanted to work in law enforcement? Yes ✓ No _____

If yes, please describe: Thought about it and applied when I was 22, but didn't catch on

18. Do you know any attorneys or judges? Yes ✓ No _____

Who? Pat Davis

Nature of the relationship: Casual friend, ex-wife of close friend

19. Have you, any relative or close friend ever been a witness to a crime? Yes ✓ No _____

If yes, please explain: I saw a shop-lifter's getaway at Grossmont Center once

20. Have you or anyone close to you ever been the victim of a crime whether reported to police or not? Yes ✓ No _____

If yes, please explain: car clout in 1983, and some tools stolen in 1979, I think.

21. Whether or not you considered it a crime, have you or anyone close to you ever been verbally or physically assaulted by anyone including a

stranger, family member or friend? Yes _____ No ✓

If yes, please explain:

22. Have you ever had any direct contact with the police (victim, witness, suspect, traffic accident, traffic citation, etc.)? Yes ✓ No _____

If yes, what type of contact was it? police report on tool theft, witness to traff acc, traffic acc & citation

What was the outcome? nothing really

23. Have you ever had any positive experiences with police officers?

Yes ✓ No _____ If yes, please describe. Beat officers calming down a neighborhood dispute,

24. Have you ever had any negative experiences with police officers?

Yes _____ No ✓ If yes, please describe. Patrol officer who knew Stop sign was not visible and chose to write cites rather than notify traffic engineering. (Case dismissed in FOJ.)

25. Have you previously served on jury duty? Yes ✓ No _____

If yes, list all cases below:

Please provide the following information about about each case:

Criminal Or Civil Charges/Issues
Name of case Where served When served
Did jury reach verdict

Crim Att Murder Peop v. Crowell? SD 1983? yes

26. Have you eyer been selected as a foreperson of any jury?

Yes _____ No ✓

27. Have you ever belonged to any organized civic, social, political, sporting or religious organization. If so, please explain the type of organization any office you may have held. The closest is the zoo society.

28. Please describe you hobbies or special interests. photography, auto repair

29. How do you get your news?

Newspapers ✓ Which ones? Times Trib How often? Daily Television ✓ Which channels? various How often? sporadically Radio ✓ Which stations? KFMB How often? @ morning

30. Have you ever written a "letter to the editor"?

Yes ✓ No _____

If yes, on what subject? Don't recall. I was probably 12.

31. Have you had any experience with:

a. prosecutors (district attorneys)? Yes ✓ No _____

If yes, please explain: Pat Davis is casual (as opposed to formal) friend.

b. criminal defense lawyers? Yes _____ No ✓

If yes, please explain:

32. Do you have any specific biases for or against:

a. criminal defense lawyers? no

b. prosecutors (district attorneys)? no

c. law enforcement officials (police officers, sheriffs, probation officers, etc.) no

33. Do you or any member of your immediate family own or keep any weapons?

Yes _____ No ✓

If yes, please state:

Type of weapon(s):

Intended purpose:

Have you ever used any weapon(s) plinked with 22 about 20 years ago.

Do you or any member of your immediate family belong to any organizations associated with firearms such as the NRA and, if so, which ones: no

Have you or any family member ever been injured by a gun?

Yes ✓ No _____

If yes, what happened: a cousin committed suicide with a hand gun about 33 years ago.

34. Do you have any serious health problems? Yes _____ No ✓

If yes, please state:

The nature of your problem

The length of time you have suffered from this problem

What medication are you taking?

35. What is the condition of your hearing? adequate, I guess

36. Do you have any specific problems at home or at work that might interfere with your duties as a juror during the trial? Depending on time frame, the service could delay my handing off certain project duties at work

37. Have you heard or read anything about this case? I think so

38. What have you read or heard? probably the facts given in the cover sheet, plus I think (cont.) (A)

When? I'm not sure, last year sometime

39. What is your best recollection of how you heard or read about this case? Probably ~~he~~

have read this in the papers.

What did you think or feel when you heard or read this? I don't recall. Probaly a sanguine response.

40. Do you have any bumper stickers or "message" license plate holder or personalized license plates on your car or other cars in your family? Yes ✓ No _____

If yes, what is it? ADOPTIVE PARENT - S.D. ZOO SOC.

41. a. What are your current favorite television programs? Cheers, Designing Women, Murphy Brown, Empty Nest, Dear John

b. Please name the three public figures you admire most? Sen. Dennis DiConcini, (D-AZ), Dick Cavett, Sen. Howell Heflin (D-AL

42. What is the most important value a parent can teach a child as he/she is growing up? responsibility, responsibility, responsibility

43. How do you feel about the way the criminal justice system deals with crime? on average, it's pretty average.

44. What do you feel is the major cause of crime in our society? drugs

45. What qualities do you feel are most important in sitting as a juror on a criminal case? analysis & ability to pay attention and take good notes.

46. Do you feel you are usually able to determine when a lie is being told to you? Yes ✓ No _____

47. Have you, any family member or any friend ever consulted a psychiatrist, a psychologist or a counselor? Yes ✓ No _____

1) Please explain circumstances. college roomie has seen a shrink on and off over the years, mostly for company

2) Have you or your spouse ever studied psychiatry, psychology or related subjects? Yes ✓ No _____ Psych I.

48. What is your ethnic and racial background (optional)? caucasian

49. Have you or has any member of your family ever experienced racial prejudice? Yes _____ No ✓ If yes, please explain.

50. What is the racial make-up of your neighborhood? Mostly white, some hispanic & black,

51. Do you speak a language other than English? Yes _____ No ✓

If yes, please. state which language(s), how fluent you are and how you learned the language(s).

52. When you hear the word "gang" what do you think of? crips, bloods, etc.

53. What do you know about gangs? you just got it in question 52.

Please explain and state what is your source of information? (e.g. television, movies)

54. What impressions or feelings do you have about gangs based upon what you read or saw? I'm not too thrilled about them.

55. Have you or anyone close to you had any personal experience with gangs? I don't know

If yes, please explain.

56. Why do you think people join gangs on the street or in prison? partly peer pressure, partly nothing better to do

57. Have you or anyone you know had a problem with drugs and/or alcohol? Yes ✓ No _____

If yes, please explain: Nephew in jam several times from drugs, father-in-law was alcoholic,

former next-door neighbor dealt a little, we thought.

58. What have you read or heard about heroin or cocaine? the usual properties, addicting, pretty bad heath effects.

59. Do you know anyone who has used drugs such as heroin or cocaine? Yes ____ No ____ probably

60. Do you know anyone who has been treated for drug abuse? Yes ✓ No ____

61. What are your sources of information about heroin? Please describe. magazine & newspaper articles

62. How do you feel about the use of alcohol? rather neutral, but do not like drunk drivers & drunks

63. Do you drink alcohol? Yes ✓ No ____

64. Do you associate with people who drink? Yes ✓ No ____

65. If you do not drink, is this because of personal or religious preferences or beliefs?

66. When the government accuses someone of a crime, it is then up to the government, through the district attorney, to prove the defendant guilty beyond a reasonable doubt. Do you believe that this form of prosecution is fair to both sides? no, but that's the whole point, isn't it.

67. Please state your personal belief regarding each of these statements.

a. The defendant is innocent until proven guilty beyond a reasonable doubt. False. The presumption is what is missing in the above statement.

b. If the prosecution goes to the trouble to bring someone to trial, the person is probably [*probably explanation* (B)] guilty of the

charges. On average, yes, but there are many instances where the charges are unfounded

c. Regardless of what the law says, a defendant in a criminal trial should be required to prove his or her innocence. Baloney. The people have to make the case. If this is done, then the deft. has to unmake it, but only then.

d. The accused should be required'to testify as a witness before he can be found not guilty. Baloney twice. If the people cannot make the case on their own, they have no business coming into court.

e. The accused should *not* be required to testify as a witness before he can be found not guilty. irrelevant. This is not a star chamber system.

As the judge in this case, I want to ask you some questions regarding your feelings about the death penalty because if Mr. Ayala is convicted of the charges, it is one of the possible punishments he could receive. The other possible punishment is life in prison without the possibility of parole. *By asking these questions I am not suggesting that you will ever need to decide the issue of punishment. I have no way of knowing what the evidence will be in this case or whether you will find Mr. Ayala guilty of anything at all. Mr. Ayala is presumed innocent unless and until proven guilty beyond a reasonable doubt.*

68. Are you a member of a group, religious body, or religious organization which has among its tenants either the use of, or the prohibition against, the death penalty?

Yes _____ No ✓ If so, please explain:

69. What are your feelings about the death penalty? it is justified in relation to certain crimes and has a zero recidivism rate, so far.

70. Have your feelings on the death penalty changed in the last ten years?

Yes _____ No ✓

If yes, in what way?

71. Do you feel that the death penalty is used:

_____ Too often _____ Too seldom

Please explain: no opinion

72. What does the penalty of "life in prison without possibility of parole" mean to you? life in prison with possibility of pardon or commutation

73. Do you believe in the adage, "An eye for an eye"? in a sense

1. What does that belief mean to you? the punishment should fit the crime and not be excessive

2. How strong is that belief? fairly strong.

3. If your view based on religious convictions? Yes _____ No ✓

74. Are there any type of crimes for which you feel the death penalty should always be imposed? possibly treason, as defined in US Const.

75. As a result of your having been asked to fill out this questionnaire, have you now formed any opinion about this case? no If so, please explain.

76. After having completed this questionnaire, is this a case in which you would like to serve as a juror and why? no feelings about this either way, really.

77. Is there anything else you feel we need to know about you regarding your jury service in this case?

EXPLANATION SHEET

If you feel that in the spaces provided you were unable to sufficiently answer any particular question, please use this sheet to provide that information. Additionally, please use this page to make note by number of any questions you did not understand or

which concern topics of a particularly personal or sensitive nature to you.

Continuation (A)

I believe that I read where one of the other accused parties was convicted with special circumstance found, but I do not recall whether I saw what the penalty was.

(B) Explanation: When you say probably, you infer some sort of liklihood of guilt. If there is not a good average liklihood of a guilty verdict, then the D.A. is really incompetent. However, the individual case is decided with respect to its individual merits, where the stochastic nature case selection & presentation admits to either possible outcome. Otherwise, why bother with a trial.

San Diego County Superior Court
[Title Omitted in Printing]

[26 CT 5646-5659]

JUROR QUESTIONNAIRE

PLEASE MAKE CERTAIN YOUR ANSWERS ARE LEGIBLE

1. Full name: Dorothy Lucille Cook
2. Date and place of birth: June 11, 1930 St. Louis, Missouri
3. In what area do you currently live (not specific address): El Cajon
4. Current occupation and employer: Housewife
5. What are your main duties:

   What types of jobs have you held in the past 10 years?
6. If you are retired, what was your previous occupation?
7. Have you or your spouse ever been in the Armed Forces? yes

   If so, what branch: U.S. Navy

   Highest rank: SK 1 When? 1945-1968

   Where did you serve: Alb. N.M., Honolulu, Hi, Port Hueneme, CA.

   What were your duties: storekeeping & supply
8. How many years of school did you attend? Check one.

   _____ Some high school.

   ✓ Graduated from high school.

   _____ Some college.

   _____ Graduated from (name of college)

   Major and type of degree

   _____ Post-graduate course work and/or

degree

Major and type of degree

Have you ever received any vocational training. If so, describe. No

9. What is your current marital status?

Single and never married ___

Single, but married in the past for ___ years.

Currently married and have been for 37 years.

Living with non-married mate for ___ years

Widow/Widower ___

Other

10. Do you have any children: Yes ✓ No ____

If so, please list as to each child: NAME SEX AGE EDUCATION OCCUPATION DOES CHILD LIVE W/YOU

James Cook, Jr. M 36 1 yr. college Elec. Main. No

Rosemary Thompson F 35 1 yr. college Prod. Super. No

Patricia Whatley F 33 high school Housewife No

11. Information about Spouse (if you are living with someone but are unmarried, please complete this question as well):

a. Where was your spouse born: St. Louis, Missouri

b. Occupation: Custodian

c. Name and location of spouse's current employer: S.D. City Schools Challenger Jr. High

d. Length of employment by current employer: 20 yrs.

e. Job description: cleaning, receiving supplies

f. How many years of school does he/she have? Check one.

___✓___ Did not graduate from high school.

_____ Graduated from high school.

_____ Attended college, but did not obtain a college degree.

_____ Graduated from college.

_____ Post graduate course work and/or degree.

g. Has he/she any law enforcement experience (including military police)?

Yes _____ No ___✓___ If yes, what was that experience?

h. If he or she is retired, what was his or her previous occupation? storekeeper. U.S. Navy

i. Does your he/she have any medical or legal training?

Yes _____ No ___✓___ If yes, please describe.

12. How many brothers and sisters do you have? ___2___

BROTHERS			SISTERS		
Name	Age	Occupation	Name	Age	Occupation
William Ellis	65	Plumber			
Rosemary Chancellor	63	H/wife			

13. Are any of your immediate family members deceased, such as mother, father, brother, sister, children? Yes ___✓___ No _____

If yes, please give date and the circumstances of death. Oct. 1979 Stroke DGTR. Oct. 1959 Suffocation

14. How often do you see/visit with your parents? 1 or 2 times a year

How often do you see/visit with your brothers and/or sisters? Brother – 1-2 times yr. Sister – 2 times week

15. Have you or anyone close to you had any legal training or worked in an office dealing with legal matters? Yes _____ No ✓ If yes, describe:

16. Have you or any member of your immediate family ever been inlvolved as a plaintiff or a defendant in a lawsuit? Yes _____ No ✓

If yes, what kind of lawsuit?

17. Have you or any close friends or relatives ever been employed by, or otherwise affiliated with, a law enforcement agency? (This includes police, sheriff, F.B.I., Highway Patrol, Drug Enforcement Administration, District Attorney, state prisons or county jails, Attorney General, United States Attorney, Immigration and Naturalization Service, United States Customs, Military Police, etc.)

Yes _____ No ✓

If yes, what agency?

Have you ever wanted to work in law enforcement? Yes _____ No ✓

If yes, please describe:

18. Do you know any attorneys or judges? Yes _____ No ✓

Who?

Nature of the relationship:

19. Have you, any relative or close friend ever been a witness to a crime? Yes _____ No ✓

If yes, please explain:

20. Have you or anyone close to you ever been the victim of a crime whether reported to police or not? Yes ✓ No _____

If yes, please explain: Burglary at my home

21. Whether or not you considered it a crime, have you or anyone close to you ever been verbally or physically assaulted by anyone including a stranger, family member or friend? Yes _____ No ✓

If yes, please explain:

22. Have you ever had any direct contact with the police (victim, witness, suspect, traffic accident, traffic citation, etc.)? Yes ✓ No _____

If yes, what type of contact was it? traffic ticket 1969

What was the outcome? I paid fine

23. Have you ever had any positive experiences with police officers?

Yes _____ No ✓ If yes, please describe.

24. Have you ever had any negative experiences with police officers?

Yes _____ No ✓ If yes, please describe.

25. Have you previously served on jury duty? Yes ✓ No _____

If yes, list all cases below:

Please provide the following information about about each case:

Criminal Or Civil Charges/Issues
Name of case Where served When served
Did jury reach verdict

Criminal Shoplifting El Cajon 1982 or 1983 Yes

Criminal DUI El Cajon 1982 or 1983 Yes

(I don't remember the names)

26. Have you eyer been selected as a foreperson of any jury?

Yes _____ No ✓

27. Have you ever belonged to any organized civic, social, political, sporting or religious organization. If so, please explain the type of organization any office you may have held. No

28. Please describe you hobbies or special interests. Reading, studying sign language

29. How do you get your news?

Newspapers Which ones? How often? Television ✓ Which channels? (39) 7 & 10 How often? 3-4 times a week Radio Which stations? How often?

30. Have you ever written a "letter to the editor"?

Yes _____ No ✓

If yes, on what subject?

31. Have you had any experience with:

a. prosecutors (district attorneys)? Yes ✓ No _____

If yes, please explain: D.A. was prosecutor at El Cajon trials.

b. criminal defense lawyers? Yes ✓ No _____

If yes, please explain: Lawyers were present at El Cajon trials.

32. Do you have any specific biases for or against:

a. criminal defense lawyers? No

b. prosecutors (district attorneys)? No

c. law enforcement officials (police officers, sheriffs, probation officers, etc.) No

33. Do you or any member of your immediate family own or keep any weapons?

Yes _____ No ✓

If yes, please state:

Type of weapon(s):

Intended purpose:

Have you ever used any weapon(s) Tried to target practice w/22 rifle

Do you or any member of your immediate family belong to any organizations associated with firearms such as the NRA and, if so, which ones: No

Have you or any family member ever been injured by a gun?

Yes _____ No ✓

If yes, what happened:

34. Do you have any serious health problems? Yes _____ No ✓

If yes, please state:

The nature of your problem

The length of time you have suffered from this problem

What medication are you taking?

35. What is the condition of your hearing? Good

36. Do you have any specific problems at home or at work that might interfere with your duties as a juror during the trial? No

37. Have you heard or read anything about this case? No

38. What have you read or heard?

When?

39. What is your best recollection of how you heard or read about this case?

What did you think or feel when you heard or read this?

40. Do you have any bumper stickers or "message" license plate holder or personalized license plates on your car or other cars in your family? Yes ✓ No _____

If yes, what is it? DOT'S CAR

41. a. What are your current favorite television programs? 60 Minutes, 20/20, Golden Girls

b. Please name the three public figures you admire most? Pete Wilson, Mayor O'Connor, Fr. Joe Carroll

42. What is the most important value a parent can teach a child as he/she is growing up? Honesty and respect

43. How do you feel about the way the criminal justice system deals with crime? O.K.

44. What do you feel is the major cause of crime in our society? Lack of discipline in children.

45. What qualities do you feel are most important in sitting as a juror on a criminal case? Impartiality and fairness

46. Do you feel you are usually able to determine when a lie is being told to you? Yes _____ No ✓

47. Have you, any family member or any friend ever consulted a psychiatrist, a psychologist or a counselor? Yes _____ No ✓

1) Please explain circumstances.

2) Have you or your spouse ever studied psychiatry, psychology or related subjects? Yes _____ No ✓

48. What is your ethnic and racial background (optional)? Irish-English

49. Have you or has any member of your family ever experienced racial prejudice? Yes _____ No ✓ If yes, please explain.

50. What is the racial make-up of your neighborhood? Mixture of Anglo, Black, Mexican, Oriental

51. Do you speak a language other than English? Yes _____ No ✓

If yes, please. state which language(s), how fluent you are and how you learned the language(s).

52. When you hear the word "gang" what do you think of? Young men and women in cars or on motorcycles

53. What do you know about gangs? Nothing – just see them portrayed on TV

Please explain and state what is your source of information? (e.g. television, movies)

54. What impressions or feelings do you have about gangs based upon what you read or saw? I feel uncomfortable

55. Have you or anyone close to you had any personal experience with gangs? No

If yes, please explain.

56. Why do you think people join gangs on the street or in prison? Safety in numbers - companionship

57. Have you or anyone you know had a problem with drugs and/or alcohol? Yes _____ No ✓

If yes, please explain:

58. What have you read or heard about heroin or cocaine? They are dangerous drugs

59. Do you know anyone who has used drugs such as heroin or cocaine? Yes _____ No ✓

60. Do you know anyone who has been treated for drug abuse? Yes _____ No ✓

61. What are your sources of information about heroin? Please describe. Just what I see on T.V.

62. How do you feel about the use of alcohol? O.K. in moderation

63. Do you drink alcohol? Yes _____ No ✓

64. Do you associate with people who drink? Yes ✓ No ____

65. If you do not drink, is this because of personal or religious preferences or beliefs? personal preference

66. When the government accuses someone of a crime, it is then up to the government, through the district attorney, to prove the defendant guilty beyond a reasonable doubt. Do you believe that this form of prosecution is fair to both sides? Yes

67. Please state your personal belief regarding each of these statements.

a. The defendant is innocent until proven guilty beyond a reasonable doubt. I believe that is true

b. If the prosecution goes to the trouble to bring someone to trial, the person is probably guilty of the charges. Not necessarily

c. Regardless of what the law says, a defendant in a criminal trial should be required to prove his or her innocence. Not true

d. The accused should be required to testify as a witness before he can be found not guilty. Not true

e. The accused should *not* be required to testify as a witness before he can be found not guilty. I agree

As the judge in this case, I want to ask you some questions regarding your feelings about the death penalty because if Mr. Ayala is convicted of the charges, it is one of the possible punishments he could receive. The other possible punishment is life in prison without the possibility of parole. *By asking these questions I am not suggesting that you will ever need to decide the issue of punishment. I have no way of knowing what the evidence will be in this case or whether you will find Mr. Ayala guilty of anything at all. Mr. Ayala is presumed innocent unless and until*

proven guilty beyond a reasonable doubt.

68. Are you a member of a group, religious body, or religious organization which has among its tenants either the use of, or the prohibition against, the death penalty?

Yes _____ No ✓ If so, please explain:

69. What are your feelings about the death penalty? I believe in the death penalty

70. Have your feelings on the death penalty changed in the last ten years?

Yes ✓ No _____

If yes, in what way? There are more serious crimes, but not very many criminals receive death penalty

71. Do you feel that the death penalty is used:

_____ Too often ✓ Too seldom

Please explain: When a person has been found guilty the judge seldom hands down a death sentence

72. What does the penalty of "life in prison without possibility of parole" mean to you? It means spending the rest of your life in prison

73. Do you believe in the adage, "An eye for an eye"? Sometimes

1. What does that belief mean to you? I think if someone commits a crime, he should be punished

2. How strong is that belief? Very

3. If your view based on religious convictions? Yes _____ No ✓

74. Are there any type of crimes for which you feel the death penalty should always be imposed? No

75. As a result of your having been asked to fill out this questionnaire, have you now formed

any opinion about this case? No If so, please explain.

76. After having completed this questionnaire, is this a case in which you would like to serve as a juror and why? I have mixed feelings. Every juror needs to be impartial. I hope I could be.

77. Is there anything else you feel we need to know about you regarding your jury service in this case? No

EXPLANATION SHEET

If you feel that in the spaces provided you were unable to sufficiently answer any particular question, please use this sheet to provide that information. Additionally, please use this page to make note by number of any questions you did not understand or which concern topics of a particularly personal or sensitive nature to you.

San Diego County Superior Court
[Title Omitted in Printing]

[26 CT 5663-5676]

JUROR QUESTIONNAIRE

PLEASE MAKE CERTAIN YOUR ANSWERS ARE LEGIBLE

1. Full name: Charles George Gindt
2. Date and place of birth: Aug. 26, 1915 Waterloo, Iowa, U.S.A.
3. In what area do you currently live (not specific address): East San Diego 92115
4. Current occupation and employer: Retired
5. What are your main duties: None

   What types of jobs have you held in the past 10 years? Electronics inspection, Assembly (Aerospace)
6. If you are retired, what was your previous occupation? same as above
7. Have you or your spouse ever been in the Armed Forces? Yes

   If so, what branch: U.S. Naval Reserve

   Highest rank: RM 1C When? July 1943

   Where did you serve: Atlantic, Carribbean, Pacific, 11th Nav. Dist.

   What were your duties: Radio communication
8. How many years of school did you attend? Check one.

   _____ Some high school.

   _____ Graduated from high school.

   ✓ Some college.

   _____ Graduated from (name of college)

   Major and type of degree

_____ Post-graduate course work and/or degree

Major and type of degree

Have you ever received any vocational training. If so, describe. 3 terms Electrotechnics, Milwaukee School of Engineering

9. What is your current marital status?

Single and never married ___

Single, but married in the past for ~~21~~ years.

Currently married and have been for 21½ years.

Living with non-married mate for ___ years

Widow/Widower ___

Other

10. Do you have any children: Yes _____ No ✓

If so, please list as to each child: NAME SEX AGE EDUCATION OCCUPATION DOES CHILD LIVE W/YOU

_____

11. Information about Spouse (if you are living with someone but are unmarried, please complete this question as well):

a. Where was your spouse born: · Davton, Ohio

b. Occupation: Retired, housewife

c. Name and location of spouse's current employer:

d. Length of employment by current employer:

e. Job description:

f. How many years of school does he/she have? Check one.

___✓___ Did not graduate from high school.

_____ Graduated from high school.

_____ Attended college, but did not obtain a college degree.

_____ Graduated from college.

_____ Post graduate course work and/or degree.

g. Has he/she any law enforcement experience (including military police)?

Yes _____ No ___✓___ If yes, what was that experience?

h. If he or she is retired, what was his or her previous occupation? seamstress

i. Does your he/she have any medical or legal training?

Yes _____ No ___✓___ If yes, please describe.

12. How many brothers and sisters do you have? ___1___

BROTHERS			SISTERS		
Name	Age	Occupation	Name	Age	Occupation
Donald E. Gindt	74	Retired			

13. Are any of your immediate family members deceased, such as mother, father, brother, sister, children? Yes ___✓___ No _____

If yes, please give date and the circumstances of death. 1968, Natural, age 77

14. How often do you see/visit with your parents? about once in 5 yrs.

How often do you see/visit with your brothers and/or sisters? same

15. Have you or anyone close to you had any legal training or worked in an office dealing with legal matters? Yes _____ No ___✓___ If yes, describe:

16. Have you or any member of your immediate family ever been inlvolved as a plaintiff or a defendant in a lawsuit? Yes _____ No ✓

If yes, what kind of lawsuit?

17. Have you or any close friends or relatives ever been employed by, or otherwise affiliated with, a law enforcement agency? (This includes police, sheriff, F.B.I., Highway Patrol, Drug Enforcement Administration, District Attorney, state prisons or county jails, Attorney General, United States Attorney, Immigration and Naturalization Service, United States Customs, Military Police, etc.)

Yes ✓ No _____

If yes, what agency? City Police Patrol, Waterloo, Iowa

Have you ever wanted to work in law enforcement? Yes _____ No ✓

If yes, please describe:

18. Do you know any attorneys or judges? Yes _____ No ✓

Who?

Nature of the relationship:

19. Have you, any relative or close friend ever been a witness to a crime? Yes _____ No ✓

If yes, please explain:

20. Have you or anyone close to you ever been the victim of a crime whether reported to police or not? Yes ✓ No _____

If yes, please explain: Home burglary, Iowa.

21. Whether or not you considered it a crime, have you or anyone close to you ever been verbally or physically assaulted by anyone including a stranger, family member or friend? Yes _____ No ✓

If yes, please explain:

22. Have you ever had any direct contact with the police (victim, witness, suspect, traffic accident, traffic citation, etc.)?
Yes ✓ No _____

If yes, what type of contact was it? Traffic citation.

What was the outcome? Fine paid

23. Have you ever had any positive experiences with police officers?

Yes _____ No ✓ If yes, please describe.

24. Have you ever had any negative experiences with police officers?

Yes _____ No ✓ If yes, please describe.

25. Have you previously served on jury duty?
Yes _____ No ✓

If yes, list all cases below:

Please provide the following information about about each case:

Criminal Or Civil Charges/Issues
Name of case Where served When served
Did jury reach verdict

26. Have you eyer been selected as a foreperson of any jury?

Yes _____ No ✓

27. Have you ever belonged to any organized civic, social, political, sporting or religious organization. If so, please explain the type of organization any office you may have held. N.R.A. Sec'y; Phoenix Observatory Ass'n, Sec.-Treas. & V.P.; Catholic Order of Foresters insured member

28. Please describe you hobbies or special interests. Reading of mystery novels

29. How do you get your news?

Newspapers ✓ Which ones? S.D. Tribune How often? daily Television ✓ Which channels? 8 & 10 How often? daily Radio ✓ Which stations? KSDO How often? daily

30. Have you ever written a "letter to the editor"?

Yes ✓ No _____

If yes, on what subject? praise of deceased western author

31. Have you had any experience with:

a. prosecutors (district attorneys)? Yes _____ No ✓

If yes, please explain:

b. criminal defense lawyers? Yes _____ No ✓

If yes, please explain:

32. Do you have any specific biases for or against:

a. criminal defense lawyers? No

b. prosecutors (district attorneys)? No

c. law enforcement officials (police officers, sheriffs, probation officers, etc.) No

33. Do you or any member of your immediate family own or keep any weapons?

Yes ✓ No _____

If yes, please state:

Type of weapon(s): Rifle, small pistol

Intended purpose: Former target shooting

Have you ever used any weapon(s) yes

Do you or any member of your immediate family belong to any organizations associated with firearms such as the NRA and, if so, which ones: No

Have you or any family member ever been

injured by a gun?

Yes _____ No ✓

If yes, what happened:

34. Do you have any serious health problems? Yes ✓ No _____

If yes, please state:

The nature of your problem Tendency to arterial blood clotting.

The length of time you have suffered from this problem about 4 yrs.

What medication are you taking? coumadin, digoxin.

35. What is the condition of your hearing? Fair

36. Do you have any specific problems at home or at work that might interfere with your duties as a juror during the trial? No

37. Have you heard or read anything about this case? Yes

38. What have you read or heard? news item, S.D. Eve. Tribune

When? 1985

39. What is your best recollection of how you heard or read about this case? same details as on page 3 this publication "Introduction"

What did you think or feel when you heard or read this? not greatly concerned

40. Do you have any bumper stickers or "message" license plate holder or personalized license plates on your car or other cars in your family? Yes _____ No ✓

If yes, what is it?

41. a. What are your current favorite television programs? "60 Minutes", "Jeopardy"

b. Please name the three public figures you

admire most? No names come to mind.

42. What is the most important value a parent can teach a child as he/she is growing up? Honesty

43. How do you feel about the way the criminal justice system deals with crime? Does well, considering all the complicalions

44. What do you feel is the major cause of crime in our society? Profits in illicit drugs.

45. What qualities do you feel are most important in sitting as a juror on a criminal case? Lack of emotionalism

46. Do you feel you are usually able to determine when a lie is being told to you? Yes ✓ No _____

47. Have you, any family member or any friend ever consulted a psychiatrist, a psychologist or a counselor? Yes _____ No ✓

1) Please explain circumstances.

2) Have you or your spouse ever studied psychiatry, psychology or related subjects? Yes _____ No ✓

48. What is your ethnic and racial background (optional)? German & Danish in previous generations

49. Have you or has any member of your family ever experienced racial prejudice? Yes _____ No ✓ If yes, please explain.

50. What is the racial make-up of your neighborhood? Mixed

51. Do you speak a language other than English? Yes ✓ No _____

If yes, please. state which language(s), how fluent you are and how you learned the language(s). Very limited French & Spanish. French from high school; Spanish from reading & radio listening

52. When you hear the word "gang" what do you think of? Teen-age street gangs.

53. What do you know about gangs? Very little

Please explain and state what is your source of information? (e.g. television, movies) Newspapers & TV news

54. What impressions or feelings do you have about gangs based upon what you read or saw? None

55. Have you or anyone close to you had any personal experience with gangs? No

If yes, please explain.

56. Why do you think people join gangs on the street or in prison? They seek strength in numbers

57. Have you or anyone you know had a problem with drugs and/or alcohol? Yes _____ No ✓

If yes, please explain:

58. What have you read or heard about heroin or cocaine? News about celebrity activity.

59. Do you know anyone who has used drugs such as heroin or cocaine? Yes _____ No ✓

60. Do you know anyone who has been treated for drug abuse? Yes _____ No ✓

61. What are your sources of information about heroin? Please describe. Newspaper medical writers.

62. How do you feel about the use of alcohol? Requires caution to prevent misuse.

63. Do you drink alcohol? Yes ✓ No _____

64. Do you associate with people who drink? Yes ✓ No _____

65. If you do not drink, is this because of personal or religious preferences or beliefs?

66. When the government accuses someone of a crime, it is then up to the government, through the district attorney, to prove the defendant guilty beyond a reasonable doubt. Do you believe that this form of prosecution is fair to both sides? Yes

67. Please state your personal belief regarding each of these statements.

a. The defendant is innocent until proven guilty beyond a reasonable doubt. Acceptable popular belief

b. If the prosecution goes to the trouble to bring someone to trial, the person is probably guilty of the charges. Not necessarily true.

c. Regardless of what the law says, a defendant in a criminal trial should be required to prove his or her innocence. Not true

d. The accused should be required'to testify as a witness before he can be found not guilty. Not technically true

e. The accused should *not* be required to testify as a witness before he can be found not guilty. True

As the judge in this case, I want to ask you some questions regarding your feelings about the death penalty because if Mr. Ayala is convicted of the charges, it is one of the possible punishments he could receive. The other possible punishment is life in prison without the possibility of parole. *By asking these questions I am not suggesting that you will ever need to decide the issue of punishment. I have no way of knowing what the evidence will be in this case or whether you will find Mr. Ayala guilty of anything at all. Mr. Ayala is presumed innocent unless and until proven guilty beyond a reasonable doubt.*

68. Are you a member of a group, religious body, or religious organization which has among its tenants either the use of, or the prohibition against, the death penalty?

Yes _____ No ✓ If so, please explain:

69. What are your feelings about the death penalty? Justifiable in some cases.

70. Have your feelings on the death penalty changed in the last ten years?

Yes _____ No ✓

If yes, in what way?

71. Do you feel that the death penalty is used:

_____ Too often ✓ Too seldom

Please explain: A hopeless case may prefer execution.

72. What does the penalty of "life in prison without possibility of parole" mean to you? Incarceration until death from any cause.

73. Do you believe in the adage, "An eye for an eye"? No

1. What does that belief mean to you? Two wrongs make a right

2. How strong is that belief? Not unshakeable

3. If your view based on religious convictions? Yes _____ No ✓

74. Are there any type of crimes for which you feel the death penalty should always be imposed? Particularly savage multiple murder.

75. As a result of your having been asked to fill out this questionnaire, have you now formed any opinion about this case? No If so, please explain.

76. After having completed this questionnaire, is this a case in which you would like to serve as a juror and why? No

77. Is there anything else you feel we need to know about you regarding your jury service in this case? No

EXPLANATION SHEET

If you feel that in the spaces provided you were unable to sufficiently answer any particular question, please use this sheet to provide that information. Additionally, please use this page to make note by number of any questions you did not understand or which concern topics of a particularly personal or sensitive nature to you.

San Diego County Superior Court
[Title Omitted in Printing]

[26 CT 5680-5693]

JUROR QUESTIONNAIRE

PLEASE MAKE CERTAIN YOUR ANSWERS ARE LEGIBLE

1. Full name: Dorothy Douglas Hagen
2. Date and place of birth: April 15, 1932 Niagara Falls, New York U.S.A.
3. In what area do you currently live (not specific address): Bonita
4. Current occupation and employer: retired
5. What are your main duties:

   What types of jobs have you held in the past 10 years? self-employed farmer, investor, teacher
6. If you are retired, what was your previous occupation? Junior College teacher
7. Have you or your spouse ever been in the Armed Forces? yes

   If so, what branch: U.S. Naval Air Reserve

   Highest rank: Seaman Appren. When? 1950-54

   Where did you serve: Niagara Falls Naval Air Station – reserve only

   What were your duties: secretarial
8. How many years of school did you attend? Check one.

   _____ Some high school.

   _____ Graduated from high school.

   _____ Some college.

   ✓ Graduated from (name of college) Univ. Calif Riverside

   Major and type of degree English B.A.

✓ Post-graduate course work and/or degree

Major and type of degree English Lit M.A.

Have you ever received any vocational training. If so, describe.

9. What is your current marital status?

Single and never married ___

Single, but married in the past for ___ years.

✓Currently married and have been for 21 years.

Living with non-married mate for ___ years

Widow/Widower ___

Other

10. Do you have any children: Yes ✓ No ___

If so, please list as to each child: NAME SEX AGE EDUCATION OCCUPATION DOES CHILD LIVE W/YOU

Allison Hagen-Price 30 M.A. teacher No

David Hagen 28 some college sales No

Richard L. Hagen 27 B.A. store owner No

11. Information about Spouse (if you are living with someone but are unmarried, please complete this question as well):

a. Where was your spouse born: Seattle, Wash. U.S.A.

b. Occupation: retired

c. Name and location of spouse's current employer: —

d. Length of employment by current employer: —

e. Job description: —

f. How many years of school does he/she

have? Check one.

_____ Did not graduate from high school.

_____ Graduated from high school.

__✓__ Attended college, but did not obtain a college degree.

_____ Graduated from college.

_____ Post graduate course work and/or degree.

g. Has he/she any law enforcement experience (including military police)?

Yes _____ No __✓__ If yes, what was that experience? —

h. If he or she is retired, what was his or her previous occupation? owner of service station, auto parts store

i. Does your he/she have any medical or legal training?

Yes _____ No __✓__ If yes, please describe.

12. How many brothers and sisters do you have? __4__

BROTHERS			SISTERS		
Name	Age	Occupation	Name	Age	Occupation
Charles R. Douglas	65	chemist retired			
Thelma Douglas	68	retired teacher			
Kathleen Trout	63	housewife			
Nancy Douglas	53	elem. school teacher			

13. Are any of your immediate family members deceased, such as mother, father, brother, sister, children? Yes __✓__ No _____

If yes, please give date and the circumstances of death. Mother died (68) 1961 – cancer; father died 1977 (81) age & heart

14. How often do you see/visit with your parents?

—

How often do you see/visit with your brothers and/or sisters? yearly (distant)

15. Have you or anyone close to you had any legal training or worked in an office dealing with legal matters? Yes _____ No ✓ If yes, describe: —

16. Have you or any member of your immediate family ever been inlvolved as a plaintiff or a defendant in a lawsuit? Yes _____ No ✓

If yes, what kind of lawsuit? —

17. Have you or any close friends or relatives ever been employed by, or otherwise affiliated with, a law enforcement agency? (This includes police, sheriff, F.B.I., Highway Patrol, Drug Enforcement Administration, District Attorney, state prisons or county jails, Attorney General, United States Attorney, Immigration and Naturalization Service, United States Customs, Military Police, etc.)

Yes ✓ No _____

If yes, what agency? Two uncles worked for Customs

Have you ever wanted to work in law enforcement? Yes _____ No ✓

If yes, please describe:

18. Do you know any attorneys or judges? Yes ✓ No _____

Who? Russell Lambeau – retired – not San Diego court

Nature of the relationship: friend – probably know others no cloe friends

19. Have you, any relative or close friend ever been a witness to a crime? Yes _____ No ✓

If yes, please explain: —

20. Have you or anyone close to you ever been the

victim of a crime whether reported to police or not? Yes ✓ No _____

If yes, please explain: I was recently 'conned' by a person pretending to be a remodeling contractor. / My daughte and son were injured by a drunk driver some years ag

21. Whether or not you considered it a crime, have you or anyone close to you ever been verbally or physically assaulted by anyone including a stranger, family member or friend? Yes _____ No ✓

If yes, please explain: —

22. Have you ever had any direct contact with the police (victim, witness, suspect, traffic accident, traffic citation, etc.)? Yes ✓ No _____

If yes, what type of contact was it? I was court witness in case involving theft of my car. / Also reported neighborhoo thefts. Also traffic citation

What was the outcome? person was convicted / person was arrested -- don't know outcome

23. Have you ever had any positive experiences with police officers?

Yes ✓ No _____ If yes, please describe. Most officers in Calif. are courteous & efficient, in my experience

24. Have you ever had any negative experiences with police officers?

Yes ✓ No _____ If yes, please describe. I recall one traffic officer who was unnecessarily rude.

25. Have you previously served on jury duty? Yes ✓ No _____

If yes, list all cases below:

Please provide the following information about about each case:

Criminal Or Civil Charges/Issues
Name of case Where served When served
Did jury reach verdict

criminal auto theft breaking & entering ? San Diego @ 10 years ago yes I was alternate juror

26. Have you eyer been selected as a foreperson of any jury?

Yes _____ No ✓

27. Have you ever belonged to any organized civic, social, political, sporting or religious organization. If so, please explain the type of organization any office you may have held. I support local groups such as Sweetwater Valley Civic Assoc. & did belong to a political group at one time. Am member now of art associations & several antique auto clubs

28. Please describe you hobbies or special interests. interested in antique automobiles & airplanes, also raise cattle

29. How do you get your news?

Newspapers ✓ Which ones? S.D. Union How often? weekly Television ✓ Which channels? local 10-8-39 How often? daily Radio Which stations? How often?

30. Have you ever written a "letter to the editor"?

Yes _____ No ✓

If yes, on what subject? —

31. Have you had any experience with:

a. prosecutors (district attorneys)?
Yes ✓ No _____

If yes, please explain: As witness in case concerning our stolen car.

b. criminal defense lawyers?
Yes ✓ No _____

If yes, please explain: same case

32. Do you have any specific biases for or against:

a. criminal defense lawyers? no

b. prosecutors (district attorneys)? no

c. law enforcement officials (police officers, sheriffs, probation officers, etc.) somewhat predjudiced in their favor – sympathy for a difficult job.

33. Do you or any member of your immediate family own or keep any weapons?

Yes ✓ No _____

If yes, please state:

Type of weapon(s): revolver

Intended purpose: protection

Have you ever used any weapon(s) yes target and hunting – years ago

Do you or any member of your immediate family belong to any organizations associated with firearms such as the NRA and, if so, which ones: No

Have you or any family member ever been injured by a gun?

Yes _____ No ✓

If yes, what happened: —

34. Do you have any serious health problems?
Yes _____ No ✓

If yes, please state:

The nature of your problem —

The length of time you have suffered from this problem —

What medication are you taking? —

35. What is the condition of your hearing? Good

36. Do you have any specific problems at home or at work that might interfere with your duties

as a juror during the trial? No

37. Have you heard or read anything about this case? yes

38. What have you read or heard? faint memories

When? don't recall

39. What is your best recollection of how you heard or read about this case? probably newspaper

What did you think or feel when you heard or read this? saddened

40. Do you have any bumper stickers or "message" license plate holder or personalized license plates on your car or other cars in your family? Yes _____ No ✓

If yes, what is it? —

41. a. What are your current favorite television programs? Movies – Wheel of Fortune – Nova

b. Please name the three public figures you admire most? Einstein – Hayakawa

42. What is the most important value a parent can teach a child as he/she is growing up? self-reliance

43. How do you feel about the way the criminal justice system deals with crime? Often the cost to society is very high in relation to what is accomplished.

44. What do you feel is the major cause of crime in our society? persons without value systems; drugs; unemployment

45. What qualities do you feel are most important in sitting as a juror on a criminal case? objectivity, patience

46. Do you feel you are usually able to determine when a lie is being told to you? Yes ✓ No _____

47. Have you, any family member or any friend

ever consulted a psychiatrist, a psychologist or a counselor? Yes ✓ No ____

1) Please explain circumstances. Consulted marriage counselor on three occasions – one during previous marriage and two occasions with my present husband.

2) Have you or your spouse ever studied psychiatry, psychology or related subjects? Yes ✓ No ____ college classes

48. What is your ethnic and racial background (optional)? caucasian Scottish-German descent

49. Have you or has any member of your family ever experienced racial prejudice? Yes ____ No ✓ If yes, please explain. —

50. What is the racial make-up of your neighborhood? caucasian, some mexican-american

51. Do you speak a language other than English? Yes ✓ No ____

If yes, please. state which language(s), how fluent you are and how you learned the language(s). French – read & write but not fluent. Learned in college; Spanish – limited vocabulary, but speak with moderate fluency. Learned – So. Calif. living and travel in Mexico

52. When you hear the word "gang" what do you think of? a group of young men

53. What do you know about gangs? have heard of ethnically-oriented gangs recently becoming involved in drug trade with increasing violence.

Please explain and state what is your source of information? (e.g. television, movies) television, newspapers – magazines

54. What impressions or feelings do you have about gangs based upon what you read or saw? I am fearful of damage to individuals and

society

55. Have you or anyone close to you had any personal experience with gangs? No

If yes, please explain. —

56. Why do you think people join gangs on the street or in prison? I suppose they feel powerless alone

57. Have you or anyone you know had a problem with drugs and/or alcohol? Yes ✓ No _____

If yes, please explain: My son, David, became involved with drugs as freshman in UCSD. He dropped out of school, and although recovered, I feel that his life was seriously damaged.

58. What have you read or heard about heroin or cocaine? Very large question – they're addictive

59. Do you know anyone who has used drugs such as heroin or cocaine? Yes ✓ No _____

60. Do you know anyone who has been treated for drug abuse? Yes ✓ No _____

61. What are your sources of information about heroin? Please describe. Varied reading

62. How do you feel about the use of alcohol? disapprove of excessive use

63. Do you drink alcohol? Yes ✓ No _____ rarely

64. Do you associate with people who drink? Yes ✓ No _____

65. If you do not drink, is this because of personal or religious preferences or beliefs? personal

66. When the government accuses someone of a crime, it is then up to the government, through the district attorney, to prove the defendant guilty beyond a reasonable doubt. Do you believe that this form of prosecution is fair to

both sides? yes

67. Please state your personal belief regarding each of these statements.

a. The defendant is innocent until proven guilty beyond a reasonable doubt. agree

b. If the prosecution goes to the trouble to bring someone to trial, the person is probably guilty of the charges. disagree

c. Regardless of what the law says, a defendant in a criminal trial should be required to prove his or her innocence. disagree

d. The accused should be required to testify as a witness before he can be found not guilty. disagree

e. The accused should *not* be required to testify as a witness before he can be found not guilty. agree

As the judge in this case, I want to ask you some questions regarding your feelings about the death penalty because if Mr. Ayala is convicted of the charges, it is one of the possible punishments he could receive. The other possible punishment is life in prison without the possibility of parole. *By asking these questions I am not suggesting that you will ever need to decide the issue of punishment. I have no way of knowing what the evidence will be in this case or whether you will find Mr. Ayala guilty of anything at all. Mr. Ayala is presumed innocent unless and until proven guilty beyond a reasonable doubt.*

68. Are you a member of a group, religious body, or religious organization which has among its tenants either the use of, or the prohibition against, the death penalty?

Yes _____ No ✓ If so, please explain:

69. What are your feelings about the death penalty? I feel that it is correct in some cases

70. Have your feelings on the death penalty changed in the last ten years?

Yes _____ No ✓

If yes, in what way? —

71. Do you feel that the death penalty is used:

_____ Too often _____ Too seldom

Please explain: can't generalize

72. What does the penalty of "life in prison without possibility of parole" mean to you? I take it literally – but have read of cases when persons so sentenced have been released

73. Do you believe in the adage, "An eye for an eye"? No

1. What does that belief mean to you? Equal punishment – in severity – to that inflicted.

2. How strong is that belief? —

3. If your view based on religious convictions? Yes _____ No ✓ ? moral

74. Are there any type of crimes for which you feel the death penalty should always be imposed? yes

75. As a result of your having been asked to fill out this questionnaire, have you now formed any opinion about this case? yes If so, please explain. I suppose it relates to 'drugs' and 'gangs'

76. After having completed this questionnaire, is this a case in which you would like to serve as a juror and why? Not especially The responsibility is somewhat more than I'd hoped. It might also involve changes in personal plans.

77. Is there anything else you feel we need to know about you regarding your jury service in this case? The judge has indicated that my trip in March can be worked around: I had also planned to be out-of-state most of July. This can be cancelled, but does involve other people.

EXPLANATION SHEET

If you feel that in the spaces provided you were unable to sufficiently answer any particular question, please use this sheet to provide that information. Additionally, please use this page to make note by number of any questions you did not understand or which concern topics of a particularly personal or sensitive nature to you.

San Diego County Superior Court
[Title Omitted in Printing]

[26 CT 5714-5727]

JUROR QUESTIONNAIRE

PLEASE MAKE CERTAIN YOUR ANSWERS ARE LEGIBLE

1. Full name: Dorothea Anne Levy
2. Date and place of birth: 10/24/30 Chicago, Il.
3. In what area do you currently live (not specific address): Mission Hills
4. Current occupation and employer: None
5. What are your main duties:

   What types of jobs have you held in the past 10 years? Teaching Full Time – Inventory Part Time
6. If you are retired, what was your previous occupation? Teaching
7. Have you or your spouse ever been in the Armed Forces? No

   If so, what branch:

   Highest rank: When?

   Where did you serve:

   What were your duties:
8. How many years of school did you attend? Check one.

   _____ Some high school.

   _____ Graduated from high school.

   _____ Some college.

   _____ Graduated from (name of college)

   Major and type of degree BSEE

   ✓ Post-graduate course work and/or degree

Major and type of degree M.S. - Education

Have you ever received any vocational training. If so, describe. No

9. What is your current marital status?

Single and never married ✓

Single, but married in the past for ___ years.

Currently married and have been ___ years.

Living with non-married mate for ___ years

Widow/Widower ___

Other

10. Do you have any children: Yes ___ No ✓

If so, please list as to each child: NAME SEX AGE EDUCATION OCCUPATION DOES CHILD LIVE W/YOU

_____

11. Information about Spouse (if you are living with someone but are unmarried, please complete this question as well):

a. Where was your spouse born: · Michigan

b. Occupation: Retired Teacher

c. Name and location of spouse's current employer: None

d. Length of employment by current employer:

e. Job description:

f. How many years of school does he/she have? Check one.

_____ Did not graduate from high school.

_____ Graduated from high school.

_____ Attended college, but did not obtain a college degree.

_____ Graduated from college.

__✓__ Post graduate course work and/or degree.

g. Has he/she any law enforcement experience (including military police)?

Yes _____ No __✓__ If yes, what was that experience?

h. If he or she is retired, what was his or her previous occupation? Teaching

i. Does your he/she have any medical or legal training?

Yes _____ No __✓__ If yes, please describe.

12. How many brothers and sisters do you have? 0

BROTHERS SISTERS

Name Age Occupation Name Age Occupation

13. Are any of your immediate family members deceased, such as mother, father, brother, sister, children? Yes __✓__ No ___

If yes, please give date and the circumstances of death. Father-1975-Stroke Mother-1937-Strep Infection

14. How often do you see/visit with your parents?

How often do you see/visit with your brothers and/or sisters?

15. Have you or anyone close to you had any legal training or worked in an office dealing with legal matters? Yes _____ No __✓__ If yes, describe:

16. Have you or any member of your immediate family ever been inlvolved as a plaintiff or a defendant in a lawsuit? Yes _____ No __✓__

If yes, what kind of lawsuit?

17. Have you or any close friends or relatives ever been employed by, or otherwise affiliated with, a law enforcement agency? (This includes

police, sheriff, F.B.I., Highway Patrol, Drug Enforcement Administration, District Attorney, state prisons or county jails, Attorney General, United States Attorney, Immigration and Naturalization Service, United States Customs, Military Police, etc.)

Yes _____ No ✓

If yes, what agency?

Have you ever wanted to work in law enforcement? Yes _____ No ✓

If yes, please describe:

18. Do you know any attorneys or judges? Yes ✓ No _____

Who? Judge James Perona – Circuit Court – Illinois

Nature of the relationship: Friend

19. Have you, any relative or close friend ever been a witness to a crime? Yes _____ No ✓

If yes, please explain:

20. Have you or anyone close to you ever been the victim of a crime whether reported to police or not? Yes ✓ No _____

If yes, please explain: Two Burglaries

21. Whether or not you considered it a crime, have you or anyone close to you ever been verbally or physically assaulted by anyone including a stranger, family member or friend? Yes ✓ No _____

If yes, please explain: Verbally assaulted by parent of child in classroom

22. Have you ever had any direct contact with the police (victim, witness, suspect, traffic accident, traffic citation, etc.)? Yes ✓ No _____

If yes, what type of contact was it? Traffic citation twice. Traffic accident witness

What was the outcome? Paid tickets.

23. Have you ever had any positive experiences with police officers?

Yes ✓ No _____ If yes, please describe. Officer friendly visited schools.

24. Have you ever had any negative experiences with police officers?

Yes _____ No ✓ If yes, please describe.

25. Have you previously served on jury duty? Yes ✓ No _____

If yes, list all cases below:

Please provide the following information about about each case:

Criminal Or Civil Charges/Issues
Name of case Where served When served
Did jury reach verdict

Criminal Assault (Forgotten) Chicago (Around 1970) Yes

Criminal Burglary (Forgotten) Chicago 1974 Yes

26. Have you eyer been selected as a foreperson of any jury?

Yes _____ No ✓

27. Have you ever belonged to any organized civic, social, political, sporting or religious organization. If so, please explain the type of organization any office you may have held. Animal rights groups

28. Please describe you hobbies or special interests. Walking, Shopping, Traveling, Reading

29. How do you get your news?

Newspapers ✓ Which ones? San Diego Union L.A. Times How often? Daily Once a week Television ✓ Which channels? 8 & 10

How often? Daily Radio Which stations? How often?

30. Have you ever written a "letter to the editor"?

Yes ____ No ✓

If yes, on what subject?

31. Have you had any experience with:

a. prosecutors (district attorneys)? Yes ____ No ✓

If yes, please explain:

b. criminal defense lawyers? Yes ____ No ✓

If yes, please explain:

32. Do you have any specific biases for or against:

a. criminal defense lawyers? No

b. prosecutors (district attorneys)? No

c. law enforcement officials (police officers, sheriffs, probation officers, etc.) No

33. Do you or any member of your immediate family own or keep any weapons?

Yes ____ No ✓

If yes, please state:

Type of weapon(s):

Intended purpose:

Have you ever used any weapon(s) No

Do you or any member of your immediate family belong to any organizations associated with firearms such as the NRA and, if so, which ones: No

Have you or any family member ever been injured by a gun?

Yes ____ No ✓

If yes, what happened:

34. Do you have any serious health problems? Yes _____ No ✓

If yes, please state:

The nature of your problem

The length of time you have suffered from this problem

What medication are you taking?

35. What is the condition of your hearing? Good

36. Do you have any specific problems at home or at work that might interfere with your duties as a juror during the trial? No

37. Have you heard or read anything about this case? No

38. What have you read or heard?

When?

39. What is your best recollection of how you heard or read about this case?

What did you think or feel when you heard or read this?

40. Do you have any bumper stickers or "message" license plate holder or personalized license plates on your car or other cars in your family? Yes _____ No ✓

If yes, what is it?

41. a. What are your current favorite television programs? This Old House – Siskell & Ebert

b. Please name the three public figures you admire most? William Proxmire, Sidney Yates, Sally Ride

42. What is the most important value a parent can teach a child as he/she is growing up? To think independently

43. How do you feel about the way the criminal justice system deals with crime? Takes too long

44. What do you feel is the major cause of crime in our society? Drugs

45. What qualities do you feel are most important in sitting as a juror on a criminal case? Paying attention Not jumping to conclusions

46. Do you feel you are usually able to determine when a lie is being told to you? Yes _____ No ✓

47. Have you, any family member or any friend ever consulted a psychiatrist, a psychologist or a counselor? Yes ✓ No _____

    1) Please explain circumstances. For depression

    2) Have you or your spouse ever studied psychiatry, psychology or related subjects? Yes ✓ No _____

48. What is your ethnic and racial background (optional)? White – Jewish

49. Have you or has any member of your family ever experienced racial prejudice? Yes ✓ No _____ If yes, please explain. Fraternal relatives lived in Nazi Germany

50. What is the racial make-up of your neighborhood? Largely white, middle class

51. Do you speak a language other than English? Yes ✓ No _____

    If yes, please. state which language(s), how fluent you are and how you learned the language(s). Spanish. Able to give simple directions for children & read easy books – High School & College courses

52. When you hear the word "gang" what do you think of? Teenage, Neigborhood associations (usually in a negative light)

53. What do you know about gangs? There are strong bonds, means of identification & heavy peer pressure

Please explain and state what is your source of information? (e.g. television, movies) TV, newspapers, magazines Also gangs were prevalent in the area in which I worked.

54. What impressions or feelings do you have about gangs based upon what you read or saw? The negative results of belonging outweigh the possible positive contributions

55. Have you or anyone close to you had any personal experience with gangs? No

If yes, please explain.

56. Why do you think people join gangs on the street or in prison? For protection, out of fear & for a sense of belonging

57. Have you or anyone you know had a problem with drugs and/or alcohol? Yes _____ No ✓

If yes, please explain:

58. What have you read or heard about heroin or cocaine? Addictive powers usually lead to self-destruction. The expense of supplies encourages users & suppliers to resort to crime

59. Do you know anyone who has used drugs such as heroin or cocaine? Yes _____ No ✓

60. Do you know anyone who has been treated for drug abuse? Yes _____ No ✓

61. What are your sources of information about heroin? Please describe. Printed material. – TV & movies

62. How do you feel about the use of alcohol? O.K. as long as its in moderation or its not a necessity

63. Do you drink alcohol? Yes ✓ No _____

64. Do you associate with people who drink? Yes ✓ No _____

65. If you do not drink, is this because of personal

or religious preferences or beliefs?

66. When the government accuses someone of a crime, it is then up to the government, through the district attorney, to prove the defendant guilty beyond a reasonable doubt. Do you believe that this form of prosecution is fair to both sides? Yes

67. Please state your personal belief regarding each of these statements.

a. The defendant is innocent until proven guilty beyond a reasonable doubt. Good statement to base a trial on.

b. If the prosecution goes to the trouble to bring someone to trial, the person is probably guilty of the charges. The person may be a victim of circumstances

c. Regardless of what the law says, a defendant in a criminal trial should be required to prove his or her innocence. Not always possible but would be desirable

d. The accused should be required'to testify as a witness before he can be found not guilty. Not necessary

e. The accused should *not* be required to testify as a witness before he can be found not guilty. Acceptable

As the judge in this case, I want to ask you some questions regarding your feelings about the death penalty because if Mr. Ayala is convicted of the charges, it is one of the possible punishments he could receive. The other possible punishment is life in prison without the possibility of parole. *By asking these questions I am not suggesting that you will ever need to decide the issue of punishment. I have no way of knowing what the evidence will be in this case or whether you will find Mr. Ayala guilty of anything at all. Mr. Ayala is presumed innocent unless and until proven guilty beyond a reasonable doubt.*

68. Are you a member of a group, religious body,

or religious organization which has among its tenants either the use of, or the prohibition against, the death penalty?

Yes _____ No ✓ If so, please explain:

69. What are your feelings about the death penalty? I am in favor of it.

70. Have your feelings on the death penalty changed in the last ten years?

Yes ✓ No _____

If yes, in what way? I've become harsher in my opinion towards criminals

71. Do you feel that the death penalty is used:

_____ Too often ✓ Too seldom

Please explain: The death penalty, when used, is subject to such long delays, that it becomes less meaningful

72. What does the penalty of "life in prison without possibility of parole" mean to you? No release for any reason

73. Do you believe in the adage, "An eye for an eye"? Not completely

1. What does that belief mean to you? Too literal a form of punishment, but some crimes are beyond remorse & rehabilitation

2. How strong is that belief? Fairly strong

3. If your view based on religious convictions? Yes _____ No ✓

74. Are there any type of crimes for which you feel the death penalty should always be imposed? Not sure

75. As a result of your having been asked to fill out this questionnaire, have you now formed any opinion about this case? No If so, please explain.

76. After having completed this questionnaire, is

this a case in which you would like to serve as a juror and why? The information given about this case suggesting that *4 months* will be the duration of the trial is discouraging.

77. Is there anything else you feel we need to know about you regarding your jury service in this case? No

EXPLANATION SHEET

If you feel that in the spaces provided you were unable to sufficiently answer any particular question, please use this sheet to provide that information. Additionally, please use this page to make note by number of any questions you did not understand or which concern topics of a particularly personal or sensitive nature to you.

San Diego County Superior Court
[Title Omitted in Printing]

[26 CT 5731-5744]

JUROR QUESTIONNAIRE

PLEASE MAKE CERTAIN YOUR ANSWERS ARE LEGIBLE

1. Full name: Ana M. Luciani

2. Date and place of birth: 6-27-36 Murtosa – Portugal

3. In what area do you currently live (not specific address): College Heights

4. Current occupation and employer: Aging Program Specialist I County of San Diego – Area Agency on Aging

5. What are your main duties: Supervise 2 data entry clerks – A/P for multipurpose senior services program

   What types of jobs have you held in the past 10 years? County of San Diego – Senior Acct Clerk

6. If you are retired, what was your previous occupation? —

7. Have you or your spouse ever been in the Armed Forces? Spouse

   If so, what branch: Navy

   Highest rank: ? When?

   Where did you serve: USA

   What were your duties: ?

8. How many years of school did you attend? Check one.

   _____ Some high school.

   _____ Graduated from high school.

   ✓ Some college.

_____ Graduated from (name of college)

Major and type of degree

_____ Post-graduate course work and/or degree

Major and type of degree

Have you ever received any vocational training. If so, describe.

9. What is your current marital status?

Single and never married ___

Single, but married in the past for ___ years.

Currently married and have been for ___ years.

Living with non-married mate for ___ years .

Widow/Widower Widow

Other

10. Do you have any children: Yes _x_ No _____

If so, please list as to each child: NAME SEX AGE EDUCATION OCCUPATION DOES CHILD LIVE W/YOU

Emilie F 20 UCSB Student Santa Barbara

Marie F 22 UCSD Revenue & Recovery Officer I yes

11. Information about Spouse (if you are living with someone but are unmarried, please complete this question as well): N/A

a. Where was your spouse born:

b. Occupation:

c. Name and location of spouse's current employer:

d. Length of employment by current employer:

e. Job description:

f. How many years of school does he/she have? Check one.

_____ Did not graduate from high school.

_____ Graduated from high school.

_____ Attended college, but did not obtain a college degree.

_____ Graduated from college.

_____ Post graduate course work and/or degree.

g. Has he/she any law enforcement experience (including military police)?

Yes _____ No _____ If yes, what was that experience?

h. If he or she is retired, what was his or her previous occupation?

i. Does your he/she have any medical or legal training?

Yes _____ No _____ If yes, please describe.

12. How many brothers and sisters do you have?

BROTHERS (3) SISTERS (2)

Name Age Occupation Name Age Occupation

Jose Cravo 62 Maintenance

Francisco Cravo 58 County Gardner Supervisor

Joao Cravo 56 Gardner

Mary Praz 62 Housewife

Luiza Penduro 60 Assembler

13. Are any of your immediate family members deceased, such as mother, father, brother, sister, children? Yes _x_ No _____

If yes, please give date and the circumstances of deat

h. father – 1966 phenumonia

14. How often do you see/visit with your parents? Mother lives w/me

    How often do you see/visit with your brothers and/or sisters? 1 once every 2 to 3 week

15. Have you or anyone close to you had any legal training or worked in an office dealing with legal matters? Yes __x__ No _____ If yes, describe: daughter – appeared for the Co she worked in Small Claims Court

16. Have you or any member of your immediate family ever been inlvolved as a plaintiff or a defendant in a lawsuit? Yes _____ No __x__

    If yes, what kind of lawsuit?

17. Have you or any close friends or relatives ever been employed by, or otherwise affiliated with, a law enforcement agency? (This includes police, sheriff, F.B.I., Highway Patrol. Drug Enforcement Administration, District Attorney, state prisons or county jails, Attorney General, United States Attorney, Immigration and Naturalization Service, United States Customs, Military Police, etc.)

    Yes __x__ No _____

    If yes, what agency? nephew – General Maintenance for County Jail

    Have you ever wanted to work in law enforcement? Yes _____ No __x__

    If yes, please describe:

18. Do you know any attorneys or judges? Yes __x__ No _____

    Who? Attorney – Ibersnaic

    Nature of the relationship: attorney consulted on Will

19. Have you, any relative or close friend ever been a witness to a crime? Yes _____ No __x__

If yes, please explain:

20. Have you or anyone close to you ever been the victim of a crime whether reported to police or not? Yes __x__ No _____

If yes, please explain: Robbed of my purse in front door of work

21. Whether or not you considered it a crime, have you or anyone close to you ever been verbally or physically assaulted by anyone including a stranger, family member or friend? Yes _____ No __x__

If yes, please explain:

22. Have you ever had any direct contact with the police (victim, witness, suspect, traffic accident, traffic citation, etc.)? Yes __x__ No _____

If yes, what type of contact was it? victim – reporting robbery trafic citation

What was the outcome? robbery – out on probation being first offence

23. Have you ever had any positive experiences with police officers?

Yes _____ No __x__ If yes, please describe.

24. Have you ever had any negative experiences with police officers?

Yes _____ No __x__ If yes, please describe.

25. Have you previously served on jury duty? Yes __x__ No _____

If yes, list all cases below:

Please provide the following information about about each case:

Criminal Or Civil Charges/Issues
Name of case Where served When served
Did jury reach verdict

Civil Rape S.D. County 1984 yes

26. Have you eyer been selected as a foreperson of any jury?

Yes _____ No __x___

27. Have you ever belonged to any organized civic, social, political, sporting or religious organization. If so, please explain the type of organization any office you may have held. S.D. Womens Org Treasurer

28. Please describe you hobbies or special interests. walking, exercise, dancing, sewing,

29. How do you get your news?

Newspapers __x__ Which ones? S.D Evening Tribune How often? daily Television __x__ Which channels? 10, 8 How often? daily Radio __x__ Which stations? Q106 How often? daily

30. Have you ever written a "letter to the editor"?

Yes _____ No __x___

If yes, on what subject?

31. Have you had any experience with:

a. prosecutors (district attorneys)? Yes _____ No __x___

If yes, please explain:

b. criminal defense lawyers? Yes _____ No __x___

If yes, please explain:

32. Do you have any specific biases for or against:

a. criminal defense lawyers? no

b. prosecutors (district attorneys)? no

c. law enforcement officials (police officers, sheriffs, probation officers, etc.) no

33. Do you or any member of your immediate family own or keep any weapons?

Yes _____ No __x___

If yes, please state:

Type of weapon(s):

Intended purpose:

Have you ever used any weapon(s) no

Do you or any member of your immediate family belong to any organizations associated with firearms such as the NRA and, if so, which ones:

Have you or any family member ever been injured by a gun?

Yes _____ No __x__

If yes, what happened:

34. Do you have any serious health problems? Yes _____ No __x__

If yes, please state:

The nature of your problem

The length of time you have suffered from this problem

What medication are you taking?

35. What is the condition of your hearing?

36. Do you have any specific problems at home or at work that might interfere with your duties as a juror during the trial? no

37. Have you heard or read anything about this case? ~~no~~ yes

38. What have you read or heard? on TV news

When? can not recall date

39. What is your best recollection of how you heard or read about this case? from TV news, I don't recall names, only the name of the street it occur

What did you think or feel when you heard or read this? I felt sad

40. Do you have any bumper stickers or "message" license plate holder or personalized license plates on your car or other cars in your family? Yes __x__ No _____

    If yes, what is it? Message "I'd rather be with Tom Selick"

41. a. What are your current favorite television programs? Equializer

    b. Please name the three public figures you admire most? President, Governor of Ca & Mayor of S.D.

42. What is the most important value a parent can teach a child as he/she is growing up? teach love & respect for the child and others property

43. How do you feel about the way the criminal justice system deals with crime? as best as they can

44. What do you feel is the major cause of crime in our society? In today's society drugs is the major cause

45. What qualities do you feel are most important in sitting as a juror on a criminal case? be able to listen with an open mind on all evidence, and then come to a resolution

46. Do you feel you are usually able to determine when a lie is being told to you? Yes _____ No __x__

47. Have you, any family member or any friend ever consulted a psychiatrist, a psychologist or a counselor? Yes _____ No __x__

    1) Please explain circumstances.

    2) Have you or your spouse ever studied psychiatry, psychology or related subjects? Yes _____ No __x__

48. What is your ethnic and racial background (optional)? Portuguese/White

49. Have you or has any member of your family ever experienced racial prejudice? Yes _____ No __x____ If yes, please explain.

50. What is the racial make-up of your neighborhood? White/Mexican/Black

51. Do you speak a language other than English? Yes __x__ No _____

    If yes, please. state which language(s), how fluent you are and how you learned the language(s). Spanish – School Portuguese – Born in Portugal

52. When you hear the word "gang" what do you think of? Mostly young People dealing with drugs

53. What do you know about gangs? Just what I read in newspapers & T.V.

    Please explain and state what is your source of information? (e.g. television, movies) television, radio, newspaper

54. What impressions or feelings do you have about gangs based upon what you read or saw? 1st we need to control the drugs that gangs are able to get so easily & then reliabilitate these people who are involved in gangs

55. Have you or anyone close to you had any personal experience with gangs? no

    If yes, please explain.

56. Why do you think people join gangs on the street or in prison? Mostly on the street

57. Have you or anyone you know had a problem with drugs and/or alcohol? Yes _____ No __x___

    If yes, please explain:

58. What have you read or heard about heroin or cocaine? these drugs are harmful to your body

59. Do you know anyone who has used drugs such

as heroin or cocaine? Yes _____ No __x__

60. Do you know anyone who has been treated for drug abuse? Yes _____ No __x__

61. What are your sources of information about heroin? Please describe. Have not read on the subject – Just on T.V.

62. How do you feel about the use of alcohol? Can be just as deadly as drugs

63. Do you drink alcohol? Yes _____ No __x__

64. Do you associate with people who drink? Yes __x__ No _____

65. If you do not drink, is this because of personal or religious preferences or beliefs? belief

66. When the government accuses someone of a crime, it is then up to the government, through the district attorney, to prove the defendant guilty beyond a reasonable doubt. Do you believe that this form of prosecution is fair to both sides? yes

67. Please state your personal belief regarding each of these statements.

a. The defendant is innocent until proven guilty beyond a reasonable doubt. I believe a person is innocent until all evidence is heard.

b. If the prosecution goes to the trouble to bring someone to trial, the person is probably guilty of the charges. not always

c. Regardless of what the law says, a defendant in a criminal trial should be required to prove his or her innocence. I believe with this statement, that a defendant should prove his/her innocence

d. The accused should be required'to testify as a witness before he can be found not guilty. It should not be a requirement to testify on his/her behalf.

e. The accused should *not* be required to testify

as a witness before he can be found not guilty. No comment. Do not know enough about the law to comment on *D & E*

As the judge in this case, I want to ask you some questions regarding your feelings about the death penalty because if Mr. Ayala is convicted of the charges, it is one of the possible punishments he could receive. The other possible punishment is life in prison without the possibility of parole. *By asking these questions I am not suggesting that you will ever need to decide the issue of punishment. I have no way of knowing what the evidence will be in this case or whether you will find Mr. Ayala guilty of anything at all. Mr. Ayala is presumed innocent unless and until proven guilty beyond a reasonable doubt.*

68. Are you a member of a group, religious body, or religious organization which has among its tenants either the use of, or the prohibition against, the death penalty?

Yes _____ No __x__ If so, please explain:

69. What are your feelings about the death penalty? I don't believe in taking a life on the otherhand Criminals who take lives should be in prison without parole

70. Have your feelings on the death penalty changed in the last ten years?

Yes _____ No __x__

If yes, in what way?

71. Do you feel that the death penalty is used:

__x__ Too often _____ Too seldom

Please explain:

72. What does the penalty of "life in prison without possibility of parole" mean to you? Criminal in a prision without ever leaving the grounds.

73. Do you believe in the adage, "An eye for an eye"? no

1. What does that belief mean to you? "A criminal took a life now is our turn to take his"

2. How strong is that belief? as I stated above – strong

3. If your view based on religious convictions? Yes _x_ No _____

74. Are there any type of crimes for which you feel the death penalty should always be imposed? None

75. As a result of your having been asked to fill out this questionnaire, have you now formed any opinion about this case? no If so, please explain.

76. After having completed this questionnaire, is this a case in which you would like to serve as a juror and why? no – If I am selected as a Juror and all Jurors voted for the death penalty I probably would not be able to vote for the death penalty

77. Is there anything else you feel we need to know about you regarding your jury service in this case? none

EXPLANATION SHEET

you feel that in the spaces provided you were ur. ble to sufficiently answer any particular question, please use this sheet to provide that information. Additionally, please use this page to make note by number of any questions you did not understand or which concern topics of a particularly personal or sensitive nature to you.

San Diego County Superior Court
[Title Omitted in Printing]

[27 CT 5762-5778]

NAME: Streed, Douglas, D.

Last First M.I.

Jury Impanelment Nunber:

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. HECTOR JUAN AYALA, Defendants.	) CASE NO. CR-78077) D.A. NO.A 88447)) QUESTIONNAIRE FOR) PROSPECTIVE JURORS)))))

TO PROSPECTIVE JURORS:

Being a juror is a serious responsibility. Your answers to this questionnaire will substantially shorten the process of jury selection. Answer each question as completely and as accurately as you can. Your written answers will save valuable time during the in-court questioning by the judge and lawyers.

There are no right or wrong answers; the only right answer is what you think and believe. Your duty as a potential juror is to answer the questions honestly and conscientiously. You should answer this questionnaire by yourself. You must not discuss

the questions or your answers with anyone else. If you do not understand a question, answer it "I do not understand"

It is my intent your responses to the questionnaire be confidential and will be released only to the Judge and staff of the defense and prosecution in this case, they will become part of the court records. Pending any further court order, the legal staff is under orders to maintain the confidentially of any information it learns in the course of reviewing these questionnaires.

There is an "Explanation Sheet" attached to the questionnaire. Please use this page to note any of the following: (1) further comments regarding your answers; (2) questions which you do not understand; or (3) questions which are particularly troubling to you.

Because this questionnaire is part of the jury selection process, the questions must answered by you under penalty of perjury.

After you have completed filling out the questionnaire, please leave it at the Jury Commissioner's Office. You are then free to leave. You will be contacted by the Court regarding when you are to next appear.

Your candor and honesty in answering these questions are appreciated. Thank you for your cooperation.

INTRODUCTION

What follows is a very brief statement of the charges against Hector Ayala, the accused in the case in which you are a prospective juror. The statement is not evidence and you are not to assume that any of its contents are true. Indeed, Mr. Ayala is presumed innocent and the truth, if any, of the charges against him must be proved by the prosecution beyond a reasonable doubt. This statement is presented only to assist you in completing the questionnaire and to give you a framework for your answers.

On April 26, 1985, three men were found dead in a body shop located at 43rd and National in San Diego. Their names were Emesto "Chacho" Dominguez, Jose "Pepe" Rositas and Marcos Zamora. Their hands were tied with duct tape and each had been shot in the head. When the police arrived, they found a fourth individual, Pedro "Pete" Castillo who was in the street near the shop. He had been shot in the lower back and was also tied with duct tape. Three individuals were named as the perpetrators -- Ronaldo Ayala, Hector Ayala, and Joseph Moreno. Hector Ayala is charged in this case with the murder of these three individuals and the attempted murder of the fourth person.

JUROR QUESTIONNAIRE

PLEASE MAKE CERTAIN YOUR ANSWERS ARE LEGIBLE

1. Full name: Douglas Donald Streed

2. Date and place of birth: 3/28/46 Hallock, Minnesota

3. In what area do you currently live (not specific address): Ramona

4. Current occupation and employer: Airline Pilot US Air

5. What are your main duties: Captain Boeing 737

   What types of jobs have you held in the past 10 years? Airline pilot

6. If you are retired, what was your previous occupation?

7. Have you or your spouse ever been in the Armed Forces? I served 9 years

   If so, what branch: USAF

   Highest rank: CAPT When? 1969-1978

   Where did you serve: Texas, Flordia, Arizona, Calif and Iceland

What were your duties: Instructor pilot T-38, F-4

8. How many years of school did you attend? Check one.

_____ Some high school.

_____ Graduated from high school.

_____ Some college.

__x__ Graduated from (name of college) University of Minn

Major and type of degree Bach of Elec. Engineering

_____ Post-graduate course work and/or degree

Major and type of degree

Have you ever received any vocational training. If so, describe.

9. What is your current marital status?

Single and never married ___

Single, but married in the past for ___ years.

Currently married and have been for 20 years.

Living with non-married mate for ___ years

Widow/Widower ___

Other

10. Do you have any children: Yes x No ___

If so, please list as to each child: NAME SEX AGE EDUCATION OCCUPATION DOES CHILD LIVE W/YOU

Monica F 12 student yes

Deidre F 10 student yes

Holly F 6 student yes

11. Information about Spouse (if you are living

with someone but are unmarried, please complete this question as well):

a. Where was your spouse born: Oakland, CA

b. Occupation: unemployed

c. Name and location of spouse's current employer:

d. Length of employment by current employer:

e. Job description:

f. How many years of school does he/she have? Check one.

_____ Did not graduate from high school.

_____ Graduated from high school.

_____ Attended college, but did not obtain a college degree.

_____ Graduated from college.

__x__ Post graduate course work and/or degree.

g. Has he/she any law enforcement experience (including military police)?

Yes _____ No __x__ If yes, what was that experience?

h. If he or she is retired, what was his or her previous occupation? Owner of a Montessori School for children ages 2-9 yrs

i. Does your he/she have any medical or legal training?

Yes _____ No __x__ If yes, please describe.

12. How many brothers and sisters do you have? __2__

BROTHERS			SISTERS		
Name	Age	Occupation	Name	Age	Occupation

Henry 44 Elec. Eng Elizabeth 38 Housewife

13. Are any of your immediate family members deceased, such as mother, father, brother, sister, children? Yes __ No _x_

If yes, please give date and the circumstances of death.

14. How often do you see/visit with your parents? 1-2 yearly

How often do you see/visit with your brothers and/or sisters? yearly

15. Have you or anyone close to you had any legal training or worked in an office dealing with legal matters? Yes ___ No _x_ If yes, describe:

16. Have you or any member of your immediate family ever been inlvolved as a plaintiff or a defendant in a lawsuit? Yes _____ No _x_

If yes, what kind of lawsuit?

17. Have you or any close friends or relatives ever been employed by, or otherwise affiliated with, a law enforcement agency? (This includes police, sheriff, F.B.I., Highway Patrol, Drug Enforcement Administration, District Attorney, state prisons or county jails, Attorney General, United States Attorney, Immigration and Naturalization Service, United States Customs, Military Police, etc.)

Yes _____ No _x_

If yes, what agency?

Have you ever wanted to work in law enforcement? Yes ___ No _x_

If yes, please describe:

18. Do you know any attorneys or judges? Yes ___ No _x_

Who?

Nature of the relationship:

19. Have you, any relative or close friend ever been a witness to a crime? Yes ___ No _x_

If yes, please explain:

20. Have you or anyone close to you ever been the victim of a crime whether reported to police or not? Yes _x_ No _____

If yes, please explain: My wife had her sports car hard top stolen – Ariz about 1972

21. Whether or not you considered it a crime, have you or anyone close to you ever been verbally or physically assaulted by anyone including a stranger, family member or friend? Yes _____ No _x_

If yes, please explain:

22. Have you ever had any direct contact with the police (victim, witness, suspect, traffic accident, traffic citation, etc.)? Yes _x_ No _____

If yes, what type of contact was it? traffic citation - 1967

What was the outcome? I paid the fine

23. Have you ever had any positive experiences with police officers?

Yes _____ No _x_ If yes, please describe.

24. Have you ever had any negative experiences with police officers?

Yes _____ No _x_ If yes, please describe.

25. Have you previously served on jury duty? Yes _____ No _x_

If yes, list all cases below:

Please provide the following information about about each case:

Criminal Or Civil Charges/Issues
Name of case Where served When served
Did jury reach verdict

26. Have you eyer been selected as a foreperson of any jury?

Yes _____ No _x_

27. Have you ever belonged to any organized civic, social, political, sporting or religious organization. If so, please explain the type of organization any office you may have held. Palomar Sportsmen's club — I served as a member of the Board of Directors

28. Please describe you hobbies or special interests. horses, hunting, fishing some tennis

29. How do you get your news?

Newspapers Which ones? How often? Television _x_ Which channels? 10 How often? daily Radio Which stations? How often?

30. Have you ever written a "letter to the editor"?

Yes _____ No _x_

If yes, on what subject?

31. Have you had any experience with:

a. prosecutors (district attorneys)? Yes _____ No _x_

If yes, please explain:

b. criminal defense lawyers? Yes _____ No _x_

If yes, please explain:

32. Do you have any specific biases for or against:

a. criminal defense lawyers? No

b. prosecutors (district attorneys)? No

c. law enforcement officials (police officers, sheriffs, probation officers, etc.) No

33. Do you or any member of your immediate family own or keep any weapons?

Yes _x_ No _____

If yes, please state:

Type of weapon(s): pistols, rifles, shotguns

Intended purpose: hunting and pleasure sport shooting

Have you ever used any weapon(s) yes

Do you or any member of your immediate family belong to any organizations associated with firearms such as the NRA and, if so, which ones: NRA member

Have you or any family member ever been injured by a gun?

Yes _____ No _x_

If yes, what happened:

34. Do you have any serious health problems? Yes _____ No _x_

If yes, please state:

The nature of your problem

The length of time you have suffered from this problem

What medication are you taking?

35. What is the condition of your hearing? good

36. Do you have any specific problems at home or at work that might interfere with your duties as a juror during the trial? No

37. Have you heard or read anything about this case? ~~No~~ Yes

38. What have you read or heard? I may have heard about it on TV news but nothing note worthy.

When? I cannot recall.

39. What is your best recollection of how you heard or read about this case? T.V. if in fact a did hear of it.

What did you think or feel when you heard or

read this? Anyother crime in San Diego —

40. Do you have any bumper stickers or "message" license plate holder or personalized license plates on your car or other cars in your family? Yes _____ No _x_

If yes, what is it?

41. a. What are your current favorite television programs? News — I have no specific T.V. programs that I foll

b. Please name the three public figures you admire most? Barbara Bush, George Bush, George Schultz

42. What is the most important value a parent can teach a child as he/she is growing up? Honesty

43. How do you feel about the way the criminal justice system deals with crime? I feel our repeat offense rate is too high.

44. What do you feel is the major cause of crime in our society? A failure to adhere to values in our upbringing

45. What qualities do you feel are most important in sitting as a juror on a criminal case? A open honest mind

46. Do you feel you are usually able to determine when a lie is being told to you? Yes _x_ No _____

47. Have you, any family member or any friend ever consulted a psychiatrist, a psychologist or a counselor? Yes _x_ No _____

1) Please explain circumstances. Marriage Counseling

2) Have you or your spouse ever studied psychiatry, psychology or related subjects? Yes _x_ No _____

48. What is your ethnic and racial background (optional)?

49. Have you or has any member of your family ever experienced racial prejudice? Yes _____ No __x__ If yes, please explain.

50. What is the racial make-up of your neighborhood? white

51. Do you speak a language other than English? Yes _____ No __x__

If yes, please. state which language(s), how fluent you are and how you learned the language(s).

52. When you hear the word "gang" what do you think of? I tend to think of a youth group

53. What do you know about gangs? Only what is reported on the news concerning gang wars

Please explain and state what is your source of information? (e.g. television, movies) Television, paper

54. What impressions or feelings do you have about gangs based upon what you read or saw? They tend to be drug related however some are good youth groups

55. Have you or anyone close to you had any personal experience with gangs? No

If yes, please explain.

56. Why do you think people join gangs on the street or in prison? On the street

57. Have you or anyone you know had a problem with drugs and/or alcohol? Yes _____ No __x__

If yes, please explain:

58. What have you read or heard about heroin or cocaine? That it is very addicting

59. Do you know anyone who has used drugs such as heroin or cocaine? Yes __x__ No _____

60. Do you know anyone who has been treated for drug abuse? Yes __x__ No _____

61. What are your sources of information about heroin? Please describe. NONE

62. How do you feel about the use of alcohol? I quit drinking about 6-7 years ago. However my wife will drink.

63. Do you drink alcohol? Yes _____ No _x_

64. Do you associate with people who drink? Yes _x_ No _____

65. If you do not drink, is this because of personal or religious preferences or beliefs? No

66. When the government accuses someone of a crime, it is then up to the government, through the district attorney, to prove the defendant guilty beyond a reasonable doubt. Do you believe that this form of prosecution is fair to both sides? Yes

67. Please state your personal belief regarding each of these statements.

    a. The defendant is innocent until proven guilty beyond a reasonable doubt. This is the only fair approach I can think of.

    b. If the prosecution goes to the trouble to bring someone to trial, the person is probably guilty of the charges. No, there is a chance of wrong place wrong time or poor police work.

    c. Regardless of what the law says, a defendant in a criminal trial should be required to prove his or her innocence. No we the people must have the assumption of innocence.

    d. The accused should be required'to testify as a witness before he can be found not guilty. I agree with the fifth amendment

    e. The accused should *not* be required to testify as a witness before he can be found not guilty. The accused *is* not guilty until proved guilty beyond reasonable doubt, regardless if he/she testifies or not.

As the judge in this case, I want to ask you some questions regarding your feelings about the death penalty because if Mr. Ayala is convicted of the charges, it is one of the possible punishments he could receive. The other possible punishment is life in prison without the possibility of parole. *By asking these questions I am not suggesting that you will ever need to decide the issue of punishment. I have no way of knowing what the evidence will be in this case or whether you will find Mr. Ayala guilty of anything at all. Mr. Ayala is presumed innocent unless and until proven guilty beyond a reasonable doubt.*

68. Are you a member of a group, religious body, or religious organization which has among its tenants either the use of, or the prohibition against, the death penalty?

Yes _____ No __x__ If so, please explain:

69. What are your feelings about the death penalty? I feel is some cases the death penalty is the correct solution

70. Have your feelings on the death penalty changed in the last ten years?

Yes _____ No __x__

If yes, in what way?

71. Do you feel that the death penalty is used:

_____ Too often __x__ Too seldom

Please explain: It is my understanding that death row is almost a legal formality without execution

72. What does the penalty of "life in prison without possibility of parole" mean to you? This seems to be a large tax burden without a benefit to society

73. Do you believe in the adage, "An eye for an eye"? somewhat

1. What does that belief mean to you? I believe that it is meant as a deterent to crime.

2. How strong is that belief? I have never had it tested. I am open.

3. If your view based on religious convictions? Yes _____ No _x_

74. Are there any type of crimes for which you feel the death penalty should always be imposed? No not without hearing the circumstances.

75. As a result of your having been asked to fill out this questionnaire, have you now formed any opinion about this case? No If so, please explain.

76. After having completed this questionnaire, is this a case in which you would like to serve as a juror and why? Yes It would give me chance to exercise the responsibility of a citizen.

77. Is there anything else you feel we need to know about you regarding your jury service in this case? No

EXPLANATION SHEET

If you feel that in the spaces provided you were unable to sufficiently answer any particular question, please use this sheet to provide that information. Additionally, please use this page to make note by number of any questions you did not understand or which concern topics of a particularly personal or sensitive nature to you.

San Diego County Superior Court
[Title Omitted in Printing]

[2 RT 20]

we'll have the questionnaires.

I would indicate that I was informed that there's two hundred fifty-one prospective jurors that have responded to the three thousand-some-odd summonses that were sent out, and what we would anticipate is five sessions, four Tuesday and one Wednesday, with the hardship screening.

With that in mind, it's the court's inclination again to tape the initial orientation re: the hardship. I believe you both have received a copy of the proposed script--

MR. WOODWARD: Yes, your honor.

THE COURT: -- of the hardship screening?

Do you have comment concerning that?

MR. SHEELA: Yes, your honor. The first thing that that jumped out at me was that when Mr. Woodward and I had a discussion with your honor in December regarding the timing of the trial of the case, the -- what I advised the court -- I knew the court wanted to go ahead with hardship screening so that we could get our hands on jurors, get them to start planning their life if they were potential jurors in the case, and I advised the court that I believed that Miss Franco and I would be ready to commence the Hovey portion of the voir dire in the latter part of February, so when I read your first page of the hardship, it seemed to have jumped up. Actually, when I read the February 1st date, my heart jumped into my throat, because I thought I had approximately three more weeks before we started the Witherspoon or the Hovey, and that's the only

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San Diego County Superior Court
[Title Omitted in Printing]

[3 RT 41]

THE BAILIFF: No response.

THE COURT: You want to call the jurors' lounge?

THE CLERK: Okay

THE COURT: May I see counsel at side-bar, please?

(Discussion off the record at side-bar with attorneys)

THE CLERK: Would the prospective jurors please stand and raise your right hands?

Do you and each of you understand and agree that you will well and accurately and truthfully answer under penalty of perjury all questions propounded to you concerning your qualifications and competency to serve as a trial juror in the. Matter pending before the court, and that failure to do so may subject you to criminal prosecution.

Do you solemnly swear?

THE JURY: I do.

THE CLERK: Have a seat.

THE COURT: Good morning, ladies and gentlemen.

Allow me initially to start out with an apology.

I, like most people, I guess, came up with a cold during the holidays. Because of that, the initial comments of the court to you will be on tape.

Although the comments will be on tape, I want to assure you, and emphasize to you, that the comments are very important. It's important that you hear all of the comments of the court.

Additionally, if you have any questions, it's very important that you bring those questions to the court and

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[3 RT 45]

(Court's exhibit 1 continues)

(Court's exhibit 1 is stopped)

(Court's exhibit 1 continues)

THE COURT: Those of you who can serve, when you're handed the questionnaire, if you could state your full name, go to the jury commissioner's office, complete the questionnaire.

Then you're free to leave.

You can't discuss the questionnaire with anyone. It is strictly an individual process.

Have those questionnaires arrived?

MR. SHEELA: I don't know. The courtroom has been locked since 9:00 o'clock. Perhaps I should call the copy service and find out the status.

THE COURT: Okay.

(Mr. Sheela makes telephone call)

MR. SHEELA: Your honor, I'm advised that the copy service was bringing them over at five to 9:00. They were on their way.

Perhaps I can look outside?

THE COURT: Okay.

(Court's exhibit 1 continues)

THE COURT: Okay. Ladies and gentlemen, the best-laid plans sometimes falter. We're waiting for those questionnaires.

As soon as they arrive, then we will get your names on the record, have you go to the juror's lounge to complete the questionnaires.

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San Diego County Superior Court
[Title Omitted in Printing]

[5 RT 232]

It's not one of the big companies that I would want to impose on. Counsel agree that it's sufficient legal hardship?

MR. SHEELA: I do, your honor.

MR. WOODWARD: yes

THE COURT: as to the ethnic origin of miss Feliciano, counsel?

MR. SHEELA: I would say Hispanic, your honor.

MR. WOODWARD: I would say Italian.

THE COURT: And I would say I don't know. Any other speculation?

MR. SHEELA: No. That's probably sufficient for the record.

MS. FRANCO: Except to indicate, your honor, that I am Hispanic, and in my opinion, she is Hispanic.

MS. MICHAELS: I thought she was Filipino.

MR. SHEELA: I have money. Let's get some money out on this.

THE COURT: We may take that up at a later time.

MR. SHEELA: Okay.

THE COURT: Why don't you have her step in, Steve.

(Prospective juror Feliciano enters courtroom)

THE COURT: Miss Feliciano, you have stated a sufficient basis for a legal excuse, ma'am. You will be excused as to further service as to this case.

However, I'm going to request that you report back to the jurors' lounge. It may well be that you

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[5 RT 237]

THE COURT: This is a labor agreement of Rohr. I would intend to have presiding or assistant presiding call to see if he can be sprung for jury duty.

You want to have him come in?

(Prospective juror Galvan enters courtroom)

THE COURT: Mr. Galvan, I've read the labor agreement that you have with Rohr. I would intend to have contact with the employer, sir.

With that in mind, then you will hear from the court Friday. If not Friday, no later than Tuesday of next week.

Give this back to him.

(Prospective juror Galvan exits courtroom)

THE COURT: I suspect to be consistent, we should put in the ethnic origin of the people, in case they are excused.

Mr. Galvan?

MR. SHEELA: I would say Hispanic male, your honor.

THE COURT: He would appear to be Hispanic.

MR. WOODWARD: definitely male.

MR. SHEELA: Patricia Corning. She was a white female.

Alfred Anderson was a white male, and George Friederich was a white male.

THE COURT: Okay.

THE COURT: Mary Foxworthy.

THE COURT: First alliance software and technologies: "to whom it may concern, please excuse Ms. Mary Foxworthy from consideration as a juror in the pending criminal case scheduled for April.

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[5 RT 242]

policy to pay only eighty hours. After that, they will not pay us anymore.

THE COURT: Okay. Although you could serve, you would not be paid?

PROSPECTIVE JUROR BOMBOLIS: Yes.

THE COURT: What is the source of income in your household, ma'am?

PROSPECTIVE JUROR BOMBOLIS: Just me and my husband, and we just bought a new house. He's paying child support, so only his wages will support our bills if I will not be paid from work.

THE COURT: So your income is needed to maintain the house?

PROSPECTIVE JUROR BOMBOLIS: Yes.

THE COURT: Counsel have further inquiry?

MR. SHEELA: No, your honor.

MR. WOODWARD: No.

THE COURT: Why don't you step outside, ma'am. You'll hear from me very briefly.

PROSPECTIVE JUROR BOMBOLIS: Okay.

(Prospective juror Bombolis exits courtroom)

THE COURT: Counsel?

MR. SHEELA: I believe that rises to economic hardship, your honor.

MR. WOODWARD: I agree.

THE COURT: Okay. I would agree. Have her step back in.

Filipino?

[5 RT 243]

MR. SHEELA: Well, your honor, that would be my guess.

(Prospective juror Bombolis enters courtroom)

THE COURT: Okay. In light of the economic hardship that would be caused by jury service, ma'am, you will be excused from further service as to this case. However, I want you to report back to the

jurors' lounge. It may well be that you'll be assigned out on another case.

PROSPECTIVE JUROR BOMBOLIS: okay. Thank you very much.

(Prospective juror Bombolis exits courtroom)

MR. SHEELA: Female, I should say.

THE COURT: Heather Bonillas. This is Rancho Park Hospital and Residential Treatment Center; "To whom it may concern, Heather Bonillas is employed as a head counselor with Rancho Park Hospital and Residential Treatment Center. "In reference to jury duty, our policy states that we will pay the employee his/her wages less the amount paid by the court for a period of ten working days, after this ten-day period, there is no special compensation package for the employee with regard to jury duty. "If you have any questions, please contact me," Peggy Upson, U-P-S-O-N, director of human resources.

MR. SHEELA: Could we have the court contact the employer? I mean, they talk about the standard policies, and it's -- that's the same thing that we're doing with SDG&E. The question is whether they would deviate from the policy.

THE COURT: I can contact the employer. Are you

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[5 RT 247]

PROSPECTIVE JUROR BONILLAS: okay. Why don't I give you the name of someone else you could talk to, because the person in personnel wouldn't really know. How the schedule works, Peggy.

THE COURT: Yes. In all candor, ma'am, I'm more concerned with the person that hires the person in personnel, but I assume that this is Peggy Upson?

PROSPECTIVE JUROR BONILLAS: Actually, Peggy didn't hire me. It would be Mark Falls (phonetics) who is the person.

THE COURT: Is he the director?

PROSPECTIVE JUROR BONILLAS: He is the assistant program director.

THE COURT: What's the name?

PROSPECTIVE JUROR BONILLAS: Mark Falls.

THE COURT: Okay. You'll be hearing from the court, ma'am, either Friday, no later than Tuesday.

PROSPECTIVE JUROR BONILLAS: Okay. So I just wait to hear?

THE COURT: Yes.

PROSPECTIVE JUROR BONILLAS: Okay. Thank you.

(Prospective juror Bonillas exits courtroom)

THE COURT: Counsel; ethnicity?

MR. SHEELA: I was going to say white female, your honor.

MR. WOODWARD: I think counsel's perceptions are very acute this morning.

MR. SHEELA: She does have a Hispanic last name, but that was my guess.

[5 RT 248]

THE COURT: Okay. Well, "Hispanic" is classified as Caucasian.

MR. SHEELA: Your honor, with respect to her, I'm just wondering, although they have these two shifts, if there would be any possibility that they could just put her on say at the 2:00-to-7:00 or 2:00-to-8:00 o'clock shift. She'd kind of straddle over, that might work.

THE COURT: I'll talk with them and try to get them to do that. Clearly with her hours, then I think the reality is that no matter how you cut it, 7:30 to 12:30 is a very long day, and borders on or is a hardship, and if that's the only thing that we can do, then I think that that's a bit much for her.

MR. SHEELA: I agree to excuse her.

MR. WOODWARD: I would agree to excuse her for that reason.

THE COURT: I'll see if we can get some sort of concession from the employer. Brown, William Brown. This is the person that works on commission with Peck Buick.

THE COURT: Peck Buick: "To whom it may concern, this is to certify and verify that Mr. William Brown is employed by Peck Buick Company as a commissioned service writer. He is paid a base salary of six hundred fifty-seven per month, and a commission of eight percent of labor sales that he writes

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[5 RT 252]

THE COURT: White male?

MR. SHEELA: Yes, your honor.

THE COURT: John Buckner.

THE COURT: This is the city of La Mesa. City of La Mesa Parks and Recreation: "John Buckner is employed full-time by the city of La Mesa as a custodian. John is assigned to a major community center complex Monday through Friday between the hours of 5:30a.m. and 2:30p.m., where he is the sole custodian for this complex. This facility is used on a daily basis for classes, meetings and special events. If John were to serve as a juror for an extended period, his absence would create a tremendous hardship for the city. It is the city's appeal that John not be assigned to a lengthy case," H.C. "Skip" Finn (phonetics), Director of Parks and Recreation, City of La Mesa.

I would intend to have them contacted to see if he can serve.

(Prospective juror Buckner enters courtroom)

THE COURT: Mr. Buckner, I've reviewed the letter from Mr. Finn. At this point, it's still the court's belief that you can serve on this jury. I would intend to talk with Mr. Finn, or someone in the city administration. I will be back in touch with you Friday, certainly no later than Tuesday of next week. Okay.

(Prospective juror Buckner exits courtroom)

THE COURT: Black male?

MR. SHEELA: Yes.

THE COURT: Andrew Ash.

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[5 RT 269]

THE COURT: Who is that?

MR. SHEELA: Robert Moseley.

THE COURT: Have Mr. Moseley and Miss Hockenberry step in.

PROSPECTIVE JURORS: (enter the courtroom.)

BAILIFF SHARPE: (handing document to the court.)

THE COURT: Mr. Moseley, Miss Hockenberry, let me indicate that I have reviewed the policy of San Diego Gas and Electric. I intend to have further communication with your company.

With that in mind, then, you will hear from the court further on Friday, certainly no later than Tuesday. At this point you're free to return to work until further word from the court.

PROSPECTIVE JUROR MOSELEY: Thank you.

PROSPECTIVE JUROR HOCKENBERRY: Yes.

PROSPECTIVE JURORS: (exit courtroom.)

THE COURT: White female, black male.

MR. SHEELA: Yes, your honor.

THE COURT: This is realistically one of the problems that we're starting to encounter. These companies will go with us for only so long, and then they're going to shut the door. I was hoping that I would be able to beat Judge Gill, but maybe Judge Hammes beat me.

MS. MICHAELS: It's interesting, the timing of their change in the policy inasmuch as we had one on the other trial.

THE COURT: Yeah. Well, I think that's a part of the

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San Diego County Superior Court
[Title Omitted in Printing]

[9 RT 399]

THE COURT: p.m.

THE CLERK: Kurt Ruble, R-U-B-L-E.

Laura Lee Hagan-Comeau. Last name is hyphenated, H-A-G-A-N-C-O-M-E-A-U.

Kathleen L. Korin, K-O-R-I-N.

THE COURT: 26th, a.m.

THE CLERK: John J. Kelly, K-E-L-L-Y.

Leo M. Kelly, K-E-L-L-E-Y.

Michael T. Grove, G-R-O-V-E.

THE COURT: p.m.

THE CLERK: Joy C. Gritts, G-R-I-T-T-S.

Henry G. Rollins, R-O-L-L-I-N-S.

Hrand Grigorians, G-R-I-G-O-R-I-A-N-S.

THE COURT: That's correct. The record should reflect that we're down to the last two cards. In light of that, the first will be put in the a.m. on the 26th, the second in the p.m. on the 26th. First one.

THE CLERK: Charles W. Graham, G-R-A-H-A-M.

THE COURT: In the p.m.

THE CLERK: Deborah J. Phelps P-H-E-L-P-S.

THE COURT: Okay. That completes the-- all cards for the prospective jurors, in terms of assigning Hovey dates.

THE CLERK: I counted these before i shuffled them, and there were two hundred and fourteen --

THE COURT: Okay.

THE CLERK: --Exactly.

THE COURT: Okay. Off the record.

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San Diego County Superior Court
[Title Omitted in Printing]

[12 RT 507]

San Diego, California, Wednesday, 2-22-89, 1:15 p.m.

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(The following proceedings were held in open court out of the presence of the prospective jury:)

THE COURT: Let the record reflect that all parties are again present in court, outside the presence of any prospective jurors. I received a call from a Sandra K. Widener, W-I-D-E-N-E-R, indicating that she is sick with the flu. Again, I would anticipate having her come in Monday.

MR. SHEELA: That's fine, your honor.

THE COURT: Okay.

MR. SHEELA: I suppose we could discuss the first six jurors, the expanded Hovey, and do that.

THE COURT: Let's get that out of the way. What I'll do is just indicate questions that it seems to me would be appropriate for. Inquiry in expanded Hovey, and then we can get comments of counsel as to the appropriateness of that or any additional areas. All of these assume the appropriateness of the death qualification questions, so we're not going to deal with that. Lutap, Chona, question 24, 32a and c, 33, 47, 49, 52, 67c and -e, and 68.

MS. MICHAELS: What was the first number, your honor?

THE COURT: 24

[12 RT 508]

MR. WOODWARD: I don't have the subjects memorized by number here. Let me just check, if I may.

THE COURT: Maybe it would be easier -- I have the numbers, so I'll just do that from now on

and just go through with reference to the subject matter.

24 is negative experience with police officers.

32a, biases, and she circles against criminal defense lawyers. Also, law enforcement officials.

33. I don't know why.

MR. SHEELA: That was the brother of her sister-in-law accidentally that was killed while cleaning his gun.

MS. MICHAELS: Shot himself in the head.

THE COURT: Okay. That's it. 47, the consultation with a psychiatrist or other counselor.

49 deals with racial prejudice.

52 deals with the gang situation.

67c, requiring defendant to prove innocence.

e, requiring the defendant to testify.

68. This goes really with the death penalty, and would be included in any event.

With reference to Lutap, other than those areas indicated, do counsel see additional areas for the expanded Hovey?

MR. SHEELA: Yes, your honor, publicity, although she says she only reads the Union.

[12 RT 509]

THE COURT: Publicity is going to be inherent in the questioning. Death penalty and publicity are going to be two ongoing areas that counsel can inquire into.

MR. SHEELA: The only other one I had, I didn't know whether the court utilized the expanded Hovey for prior jury experience, which is question 25.

THE COURT: No, not unless I see something that presents itself as a problem that we should deal with.

MS. FRANCO: Your honor, what about in question 34? She mentions that she suffers from

PMS. I think she's the one that has to miss some work every month because of that.

THE COURT: If you want to deal with the PMS, that would be appropriate.

MS. FRANCO: Then the other thing that I have written down as to her is I think it's question 76. She discusses being nervous, or perhaps the possibility of being scared and nervous.

I wonder if we can simply to go into whether it's some of the factors that we're concerned with in this case.

THE COURT: I suspect and -- yes. I suspect that it will come out, and it certainly is something that should be delved into. Anything else with reference to Lutap?

MR. WOODWARD: No.

MR. SHEELA: No.

THE COURT: Mc Donald, question 18, in terms of

[12 RT 510]

knowledge, "I know several attorneys on a very casual basis," if counsel wants to go in that.

The victim of a crime, on question 20, is a toss-up, if you want to go into it.

22, victim-witness, no arrest, an acquittal.

In terms of contact, 24, negative experiences with police officers.

37, the knowledge, and again, on all of these, we should just assume that we can go into that area.

47, again, the psychiatrist; psychologist or counselor question.

57, the fact that the person is a recovering alcoholic, that should be dealt with in the expanded Hovey if counsel deems it to be important.

Other than those areas indicated, are there other areas that we should deal with?

THE BAILIFF: Your honor, one of our potential jurors -- excuse me -- has just arrived for this afternoon, Priscilla Cogswell. She's supposed to return on March 13th at 9:00 o'clock. She's become extremely ill, and wants to go home.

THE COURT: Okay. Well, I don't mind her coming back Monday morning, if that's acceptable with counsel.

MR. SHEELA: That's fine, your honor.

MR. WOODWARD: That's fine.

THE COURT: Instruct her to come back Monday morning

Report directly to this court at 8:00.

[12 RT 511]

THE COURT: With reference to Mc Donald, any additional areas?

MS. FRANCO: Is prior knowledge about this case included in publicity?

THE COURT: Yes.

MS. FRANCO: All right. Nothing further.

MR. SHEELA: Your honor, because he's a-- a widower, question 11, which --which normally deals with spouse, he put "not applicable."

I'd like to inquire in that area if I could.

THE COURT: Okay. Number 11.

MR. SHEELA: As to -- as to gangs, he answered question 54 about his impressions or feelings about gangs by just the word "fear," and I wanted to inquire a little there.

THE COURT: I would agree, 54.

MR. SHEELA: He also says as to 58, "What have you read or heard about heroin or cocaine?" "A great deal," and the source of information was the Mc Donald Center.

My guess is that deals with the alcoholism problem, so it's probably going to be covered otherwise.

THE COURT: I think so.

MR. SHEELA: That -- that's what I had.

MS. FRANCO: Your honor, generally may we assume that if somebody has been married and divorced, or is a widow or widower, that we may inquire; if they didn't give us the information on the prior spouse, that we may inquire?

MS. MICHAELS: During Hovey?

[12 RT 512]

THE COURT: I don't -- I don't really think that that in and of itself, the widow-widower situation.

Yes as to the divorced status. That can be put in the general.

Anything additional with reference to Mc Donald?

MR. SHEELA: No.

MR. WOODWARD: No.

THE COURT: Okay. Mc Gaw. 17. This is the volunteers with the CYA.

18, she knows Judge Low.

20, victim of a crime, brother was mugged.

47, again the psychologist, psychiatrist or counselor.

60, someone that's been treated for drug abuse, in particular alcohol.

Are there other additional areas?

MR. SHEELA: Number 33, her son shot himself in the face with a blank that was used during dog training, so that dealt with weapons.

THE COURT: Yes. I don't know if -- we may get into that. I don't have any problem. I don't see it really necessarily as a focus for expanded Hovey.

MS. FRANCO: Your honor, additionally, 49. There's an indication that-- at least implicit suggestion that this individual --

THE COURT: Racial prejudice, yes. That's appropriate. I missed that one. Okay.

[12 RT 513]

MR. WOODWARD: Did we discuss the medical problem that she feels that she has, whether that might have any impact upon her service?

THE COURT: Yes. What was the number on that?

MR. WOODWARD: 34.

THE COURT: Okay. Anything additional?

MS. FRANCO: No.

MR. WOODWARD: Not that I'm aware of.

MR. SHEELA: No, your honor.

THE COURT: Esbeck.

MS. FRANCO: Your honor, going back to Mc Gaw for a second, we did say that "gangs" was appropriate for discussion?

THE COURT: If you want to deal with that, yes, and in point of fact, if we're going to deal with it, then let's deal with it in the expanded Hovey, because during the general questioning, I would not want that to be dealt with.

Esbeck, 17, was in charge of correctional custody. That might be an area that counsel wants to inquire into.

19, victim-witness.

38, again knowledge, and the same rule will apply. We don't really have to deal with that. That's just an ongoing appropriate area for inquiry.

47, again, the counseling situation.

52, again, we don't have to continue to reiterate, but if you want to go into the gang situation, then the expanded Hovey is the appropriate spot.

[12 RT 514]

Are there any other areas?

MS. FRANCO: Your honor, I was -- I have written down 67d, with regard to burden of proof, because there's an indication that testimony on the part of the defendant would be helpful.

THE COURT: Okay. You can inquire into that.

MR. WOODWARD: Drugs and alcohol, an ongoing area?

THE COURT: Drugs and alcohol will be ongoing.

MS. MICHAELS: She was involved, it looks like, in a small claims case, a municipal court case.

MR. SHEELA: Leonard Esbeck?

MS. MICHAELS: According to my notes.

MR. SHEELA: Yes, 16.

THE COURT: 16? You can go into 16 if you desire.

MS. MICHAELS: Thank you very much.

THE COURT: Okay. Why don't we take a break.

(Brief recess)

THE COURT: We did complete Esbeck, right?

MR. SHEELA: Yes.

THE COURT: Okay. Why don't we start bringing the jurors in and let them get situated in seats?

(Prospective jurors enter courtroom)

THE CLERK: Good afternoon, ladies and gentlemen. Welcome back to department 5.

I'm going to be taking roll call at this time. As I call your name, please answer out loud.

Elizabeth Slutsky?

PROSPECTIVE JUROR SLUTSKY: Yes.

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San Diego County Superior Court
[Title Omitted in Printing]

[13 RT 581]

MR. SHEELA: Right here, I think. I see a board. I presume this is the one.

Yep.

THE COURT: Let's put it up and see.

That won't stick all the way through.

Any problems seeing that chart?

THE BAILIFF: No, sir, from either chair.

THE COURT: Okay. That's fine, then. Let's bring in -- let's start with Mr. Mc Donald.

(Prospective juror Mc Donald enters courtroom)

Edward Mc Donald

Examination

By the Court:

Q Good morning, Mr. Mc Donald.

A Good morning, sir.

Q Have you had an opportunity to review the summary of legal issues and preliminary questions?

A Yes, sir.

Q Allow me to ask you, then, these questions, sir: Because of any opinions you may hold concerning the death penalty, in the guilt or innocence phase of the trial, would you automatically vote not guilty of first degree murder, or automatically find the special circumstance false, no matter what evidence you heard, just to avoid the penalty issue?

A No.

[13 RT 582]

Q Because of any opinions you may hold concerning the death penalty, in the guilt or innocence phase of the trial, would you automatically find the defendant guilty of murder of the first degree, and find the special circumstance true, no matter what evidence you heard, just so that you could reach the penalty phase of the trial?

A No.

Q If the jury were to find the defendant guilty of murder in the first degree, and the special circumstance to be true, would you always vote for the death penalty in the penalty phase of trial, and refuse to vote for life imprisonment without possibility of parole, no matter what evidence regarding penalty you heard during the trial?

A No.

Q If the jury were to find the defendant guilty of murder in the first degree, and the special circumstance to be true, would you always vote for life in prison without the possibility of parole in the penalty phase of the trial, and refuse to vote for death no matter what evidence you heard regarding the penalty during the trial?

A No.

THE COURT: Mr. Sheela.

MR. SHEELA: Thank you, your honor.

Examination

By Mr. Sheela:

Q Good morning, Mr. Mc Donald.

A Good morning.

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[13 RT 607]

of. Here's a murder case. We'll work with this one.

Q Okay. I'm just checking over my notes of areas that I wanted to hit. There are a lot of them I don't want to touch on now.

Just a moment.

(Discussion off the record)

By Mr. Sheela:

Q Let me -- Miss Franco reminds me, we had one of the questions, "Do you know attorneys or judges?" you put down, "I know several attorneys on a very casual basis."

Can you give us any more insight there?

A Socially.

Q Anything about any of those -- any of them criminal defense attorneys; first of all?

A No.

Q Any of them prosecutors?

A I wouldn't know.

MR. SHEELA: Okay.

I have nothing further, your honor.

Thank you, Mr. Mc Donald.

THE COURT: Mr. Woodward.

MR. WOODWARD: Thank you, your honor.

Examination

By Mr. Woodward:

Q Good morning, sir.

A Good morning.

Q The problem with having two different people talk

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[13 RT 722]

[Leona Bodurant]

A Uh-huh (affirmative).

Q And from your answers to these questions, what you've told us in substance is your attitudes are. Not so strong one way or the other that it would prevent you from hearing and considering any type of evidence in this case; is that right?

A I think I would not be prejudiced. I would listen to the evidence.

Q Okay. That's what we want.

A Uh-huh (affirmative).

Q I two other areas I have to question you about.

One is your father working for the San Diego police department, and I know that was some time ago.

A He died in 1945.

Q I know you put that on the questionnaire.

Probably the police department wasn't that big --

A '47.

Q It was probably not a very large department back then either?

A I don't believe so, no.

Q Is there anything about the fact that your father was a police officer that would prevent you from being fair to Hector Ayala?

A I don't think so.

Q Some of the investigating officers in this case -- although the witness list just said "law enforcement" -- you recognize Mr. Ybarrondo's name -many of

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[13 RT 729]

A (Nods affirmatively).

Q And now you're being asked to make a decision about whether or not the defendant should die.

Are you the sort of person that can actually do that?

A I think so, based on evidence, and not on persuasion.

Q In other words, there's nothing in your make-up or your background or your feelings that would prevent you from, if you thought it was appropriate, actually voting for the death penalty; is that correct?

A I believe so.

Q Do you have any -- any doubts in your own mind about that?

There's no other way that I have of finding out these things,

A I don't think so. I've thought about it. I've had time.

Q So in this case, I guess what you're telling us is that both sides would have a fair shot; we'd have a chance to persuade you one way or the other, again depending on the strength of the evidence?

A Yes, I hope so.

Q Does having that responsibility bother you?

A Yes, I think so. I think -- I think one should be affected with that, by that. I don't think it's anything to be taken lightly.

Q Absolutely not. To the extent that you

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San Diego County Superior Court
[Title Omitted in Printing]

[14 RT 942]

discussed with anyone else, family, friends or anyone else, so I'm going to request that you not discuss at all what we've discussed in private, okay?

PROSPECTIVE JUROR BUCKNER: All right.

THE COURT: Have a good afternoon, sir.

(Prospective juror Buckner exits courtroom)

MS. MICHAELS: I think the record should reflect Mr. Buckner was a black male.

THE COURT: Yes, and miss Crecely was white female.

MR. SHEELA: Yes. On jurors that we dismiss, your honor, is their original questionnaire getting shredded as well?

THE COURT: Yes.

Let me correct that. The original questionnaires I believe we retained through the course of the jury selection process, in case counsel needs to, for whatever reason, go back to those, so we do have those.

Counsel's copies are shredded.

MR. SHEELA: The reason I didn't take a record for jurors that had actually answered the question for their ethnic background, I thought they had done that on their questionnaires.

Perhaps out of an abundance of caution, we should do that anyway.

THE COURT: It doesn't hurt us to do that. Besides that, we'll get some interesting discussions.

Okay.

THE BAILIFF: Miss Mares-Clark is next.

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[14 RT 966]

[Robert Martinez]
list of possible witnesses, or names that may well be mentioned during the course of this trial?

A Yes. I did.

Q Did you recognize any of the names on that list?

A I'm not too sure. One seemed-- that I might know-- I'm not sure -- Gil Padillo, and I may have gone to school with him back in high school.

Q Okay. Have you had any contact with Gil Padillo since high school?

A No.

Q Would you happen to know what occupation he has?

A I had heard from, you know, other sources. Or whatever that he was in the law enforcement circles.

Q Was there anything about that relationship that would cause you to prejudge evidence, or be unfair to either of these parties?

A No.

Q Okay. Mr. Martinez, what I would like to do is to go through those four questions with you on the record, okay?

A Okay.

Q Because of any opinion that you may hold concerning the death penalty, in the guilt phase of the trial, would it be difficult for you, or would you automatically vote not guilty of first degree murder, or find the special circumstance not to be proved, no matter what evidence you heard, just to avoid the penalty issue?

A Well, I've though about that, but it's a

[14 RT 967]

difficult question, and yeah, it is difficult for me to say, you know, one way or the other.

I believe in it, but for me to be involved in it is -- is hard. It's hard to accept that aspect of it, do you know what I mean?

I wouldn't be afraid to I guess make an opinion or, you know, make a judgment, whatever.

Q Would the thought -- I guess the question really goes to the thought, sir.

Would the fact of -- your feelings about the death penalty cause you to color the evidence in a certain way, just because of your feelings about the death penalty-

A No.

Q --Or would you objectively be able to look at the evidence?

A I'm a pretty objective person, I think.

I feel that way.

Q Because of your opinion, referring to 3, concerning the death penalty, if the jury were to find Mr. Ayala guilty of murder in the first degree, and further find a special circumstance to be true, would you always vote for the penalty of death, and in the penalty phase refuse or find it difficult to consider life without possibility of parole, no matter what evidence you may hear?

A No, that's hard to say, because I don't know the evidence. You can't -- I mean, I -- from that question you give me, I can't formulate an answer, quite honestly. I have to look at -- find out the evidence.

[14 RT 968]

Q Are you indicating, sir, that depending on the evidence, life in prison without possibility of parole may well be a reasonable sentence, as well as death, depending on the evidence?

A Yes, sir.

THE COURT: Miss Franco.

Examination

By Ms. Franco:

Q Good afternoon, Mr. Martinez.

A Good afternoon.

Q Mr. Martinez, at the time that you filled out the questionnaire, you had to think probably a little bit more carefully about your feelings with regard to the death penalty than per haps you had ever had to do before, and then after filling the questionnaire out, I take it that you've had some more time to think about it and try to gel your thoughts and feelings with regard to the death penalty?

A Yes, I have.

Q Okay; and at the time that you filled the questionnaire out, I think it's fair to say that you thought that the death penalty was an appropriate punishment to use as a deterrent?

A As a deterrent, yes.

Q And that it wasn't used often enough?

A Yes. Yes. I feel that way, yeah.

Q And that it was an appropriate penalty where the crime was murder?

[14 RT 969]

A Yes, depending on, you know, circumstances there.

It's hard to say just "murder." I mean, it's -- you have -- I mean, some people may interpret murder as -- say, in the heat of a sports game or something like that. You could have injured someone, or hurt someone, murdered someone, they call it murder still, but is not premeditated, planned or whatever. I don't know that, you know.

If it's premeditated, planned, then to me there's a maliciousness there.

Q Sure.

A You know, I feel that way.

THE COURT: One second, please.

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[14 RT 970]

San Diego, California - Tuesday, 2-28-89 - 3:30 p.m.

--000--

Robert Martinez

Examination

By Ms. Franco:

Q I think you were answering the judge's questions and probably mine, too, by saying that you've never held that the death penalty is always appropriate for every case of murder. That's what you're saying, I guess?

A Yes, ma'am.

Q Okay. For example, as you said, if some people are at the ball game, maybe they've had a little bit too much to drink, they get into an argument because some guy is blowing cigar smoke in his neighbor's face, and they end up--one ends up killing the other one, you wouldn't consider that necessarily to be a case where the death penalty would always be appropriate?

A Yes, ma'am. I would -- yeah. I would think so.

Q Okay. But your feeling is that there are some kinds of murder for which the death penalty is appropriate?

A Yes. I believe so.

Q And are you also saying that for those kinds of crimes, whatever they are, the death penalty is always appropriate; or even then it depends on the facts and circumstances?

A No. I don't think I could say that. I don't.

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[14 RT 974]

Q Why don't you tell me what your feeling about the death penalty is? That's probably better

than my asking awful questions. Tell me how you feel about it.

A Again, I mentioned that it -- to me it's -- I feel that it's more of a deterrent, because I've never been involved in the trial. You know, it's the old cliche. If you were being held up in something like that and --you know, you can use that as, you know, a fighting point. If you shoot me, you're going to die, you know, and it may make the person think.

Q Uh-huh.

A Whereas sometimes I feel -- in my own honesty I feel that maybe the -- the jail system is -- is too lenient sometimes. My feeling is that. Okay?

And that -- you know, I think everybody formulates an opinion about certain cases or whatever or, you know, how -- you know, certain criminals should be tried, you know, or treated; and my feeling is that maybe they shouldn't be locked up with other people or whatever. Maybe they should be isolated or whatever, you know.

For some reason I'm kind of going off in different directions. I'm losing my train of thought here, you know.

Q All right. Let me --

A I mean, I-- I-- the death penalty is – is right now to me is that I think it's a necessity and that it's-- again, like I say, its more of a deterrent, you know.

Q When you say, "more of a deterrent," do you mean

[14 RT 975]

that you want it on the books, you just don't really want it used; or you want it on the books and you want it used and you want it used a lot more than it's being used?

A I hate to say i want it used a lot more. I just -- again, depending on the case. But it wouldn't

bother me to see it used a lot more. Let's put it that way, okay?

Q U-huh.

A I don't say I want it used a lot more, but it wouldn't bother me to see it used more, and more so in different cases or whatever.

Q Well, if you were a juror sitting on a case, are you the kind of person after hearing all of the evidence – if you felt that death was the appropriate sentence, are you the kind of person that could come back and say, "My verdict is death," or are you talking about other juries but not yourself?

A No. When it comes to that, I'm going to have to talk about myself.

Q Okay.

A You know, I mean I have to formulate a judgment where it's going to involve, you know, many people or some people or whatever. It's got to come from me. It's got to come from here. I don't know. It's just -- you have to think about it. You have to weigh the circumstances. You have to -- too many things are involved.

Q Are you the kind of person that could -- if you felt it was appropriate after listening to all of the evidence, are you the kind of person that could bring back a

[14 RT 976]

verdict of death?

A It would be hard, but I think I could, yes.

It's-- it's hard to say, you know- and I don't care who the person is to say that they have to put somebody away, you know. It's very hard.

Q What do you mean by "put somebody away"?

A The death penalty. Okay? It's-- I mean, all in my opinion I have to be, you know, convinced, I guess, you know.

Q When you filled out the questionnaire, there was a question as to whether or not -- the end of the questionnaire there was a question as to whether or not you felt this was a case in which you would like to serve and if so why. And your response was, "Realistically not. Curiosity yes. But inside I don't know."

What did you mean by that?

A Well, again, like I say, realistically it's hard to say that --again, using -- I mean, saying that I have to use -- if I had to -- you know, to use the death penalty, it will weigh on my mind, conscience.

So in that respect I -- I could go either way, saying, "no," you know. It would weigh on me kind of strongly.

Curiosity. Curiosity killed the goat, you know, or the cat or whatever you want to say, you know. My curiosity, it's involved in there. I -- I've never been involved in a -- in -- as a juror. So yes, I would like to do it.

[14 RT 977]

Q Right.

A So, you know, my—from my heart I don't know, really. I guess, yes, I would like to. I can say that.

Q You'd like jury experience?

A My mind says, "no," maybe, you know, because I think about it too much. Will it weigh on me a lot? In my heart the curiosity aspect, yes.

Q You'd like to be a juror sometime?

A A juror, yes.

Q And participate in that experience, but you have some reservations about whether or not your choice would be to be a juror in a capital case, in a case where the death penalty was an option?

A No. That -- I didn't mean to imply that.

What I meant is just that it's a heavy -- it's a difficult question. You know, it's a difficult question, again, like I say, to -- to bring about the death penalty, you know, me, myself.

Q You heard a little bit about this case before you were called as a prospective juror; is that right?

A Uh-huh. I -- vaguely, I mean, I'm not too sure if it's the same case or whatever. But the names kind of ring a bell, you know, so I don't know.

I may have read it in the paper. I may have seen it in the news. But I -- kind of scatterbrained. I get work a lot involved in my mind. So maybe it's in the back of my mind I have heard it, yes.

Q Okay. I know that you indicated that you now

[14 RT 978]

reside in the El Cajon area, but did you formerly live in some other part of San Diego? I mean, are you from a particular part of San Diego?

A No. I've pretty much lived all over San Diego. Let's put it that way.

Q Okay. I -- my experience is that people who come from either the Logan Heights area --

A I've lived there.

Q -- or the Shell Town area frequently tend to know a lot of other people. It's a very -- it may seem like a large community, but indeed it turns out to be a very small community.

A A small community; yes. I've lived there when I was very young, very young. Then we moved out of there into the college grove area.

Q You keep in touch with any of the people from --

A No.

Q -- that area?

A Just mostly relatives, semi relatives.

Q Do you still have relatives in either Logan Heights or the Shell Town or National City?

A Just my uncle, but I don't see him that often now.

Q The one that was burglarized?

A No. He -- well, you could say -- he lives in Encanto. He was burglarized, yes. He's a different part of Logan, the other side.

Q Okay. Let me just -- I'll move on to another

[14 RT 979]

area in a second.

let me just go back to -- for a second to Gil Padillo, because it's quite possible that Gil Padillo will be a witness in this case, and if he's the same man that you know, it would of course be important for him to take the witness stand just as any other witness would and not to have either any pluses or minuses against him on the part of some juror who might be sitting there as a result of experiences they might have had or his reputation or knowledge.

Have you sort of searched your heart in that regard? Do you really feel that there's nothing about your knowledge of him if you were to see him on the witness stand here that would cause you to think, "Well, that's Gil Padillo. He wouldn't lie," or, "Oh, that Gil Padillo, he was always lying in school"? Anything like that?

A No. I didn't even give it a second thought when I saw his name, I mean, other than they asked me if I knew anybody and I just took it for that and, well, I may have known him, and I didn't even give that because I wasn't a close associate with him. I mean, I knew him. We played a little ball together and stuff like that; but no, I couldn't say that I would think a second or second-guess him.

Q Well, you wouldn't, on the one hand, say, "If Gil Padillo said it, it must be true"?

A Well, no. I wouldn't say that. No. I -- hopefully under oath he's telling the truth. I mean, you have to take it for what it's worth. He is under oath, so you have to accept that, you know.

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[14 RT 985]

question -- you were asked if there were any types of crimes for which you feel the death penalty should always be imposed, and you wrote in on your answer, "murder."

Can you help me to understand that answer? Did you mean to say there that if you hear a crime, the crime of murder, that you feel that the death penalty should always be imposed?

A Well, I mentioned before to me -- I mean, you have to -- I may accept -- or I may interpret murder as being different -- differently in different case. Again, like I say, getting sack to the sports aspect.

Q I understand.

A You know. One is murder and another one is murder, another one is murder; but you have different, you know, phases, or different aspects in each one regarding you know, where it pinpoints.

Was it -- it could have been murder because of, you know, a quick argument with a spouse or something like that. Maybe it may have been the first time he's ever done I mean the husband has ever done something; but in a fit of rage -- he may have seen his wife with another man or something like that and killed both of them or something like that. He may have been an ideal husband or something.

Q Sure.

A You hate to say it's murder, but I don't think he went out intentionally planning -- or maybe

he didn't. Let's put it that way. Maybe he didn't go out intentionally planning.

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San Diego County Superior Court
[Title Omitted in Printing]

[15 RT 1017]

PROSPECTIVE JUROR JUNIEL: Yes, sir?

THE COURT: -- if you would step outside of the courtroom just briefly, sir, await further direction from the court.

(Prospective juror Juniel exits courtroom)

THE COURT: Might I assume an appropriate challenge?

MR. WOODWARD: Yes.

MR. SHEELA: Not from us.

THE COURT: Okay. Mr. Juniel, obviously by Witherspoon standards, is ineligible for carry forward his function as a juror in this case, and the challenge for cause, based upon Witherspoon as well as Witt, will be granted.

You want to have Mr. Juniel come back in?

(Prospective juror Juniel enters courtroom)

THE COURT: Mr. Juniel, initially, let me state, sir, that we all appreciate your candor.

At this point, you will be excused from further service as to this case. However, the reason we do this in private is because we don't want you to discuss what we've discussed with anyone, including family or friends. I want you to keep that to yourself.

At this point, I want you to return to the jurors' lounge. It may well be that you'll be assigned out on another case.

PROSPECTIVE JUROR JUNIEL: Thank you.

(prospective juror Juniel exits courtroom)

THE COURT: Black male?

MR. SHEELA: Yes, your honor

[15 RT 1018]

MS. MICHAELS: Yes.

THE COURT: Bob, how are we doing with Burelison?

THE BAILIFF: No one is outside, sir.

THE COURT: Okay,

THE BAILIFF: Mr. Jackie Burelison is outside.

Would you come forward, please.

Please take that chair with the yellow tag on the bottom, please, okay?

Jackie Burelison

Examination

By the Court:

Q Good morning, Mr. Burelison.

A Good morning, your honor.

Q How are you doing?

A Not very well.

Q You have a cold?

A I have a bad one.

Q Okay. I don't think we'll keep you here long, so bear with us for just a little while, okay?

Mr. Burelison, while you were waiting, did you have an opportunity to review the summary of legal issues and preliminary questions?

A Yes, sir, I did.

Q Did you also have an opportunity to look at the name of potential witnesses, or people that might be mentioned during the course of this trial?

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[15 RT 1030]

The questionnaires on Burelison?

THE CLERK: I have them.

(Prospective juror Ortiz enters courtroom)

Gerardo Ortiz

Examination

By the Court:

Q Good morning, Mr. Ortiz.

A (tipping in chair) Good morning.

Q Take it easy. It's fairly stable. I'm not going to guarantee it, but it should be all right.

A All right.

Q Mr. Ortiz, just a couple of things, sir.

This morning, were you able to review the summary of legal issues?

A Yes, sir.

Q And preliminary questions?

A Yes , sir.

Q And did you also look at a list of possible witnesses, or people that might be mentioned during the course of the trial?

A Yes, sir.

Q Did you recognize any of the names on that list?

A Only one, but I don't know if it's the same guy or not.

Q What was the name?

A Miguel Lopez.

[15 RT 1031]

Q Miguel Lopez?

A I think that's what the name was.

Q How do you know?

A Mushroom farm.

Q Mushroom farm?

A Down in Pauma Valley. I don't know if he worked -- there's a couple of them, but I don't know if it is him or not.

Q What was your relationship with Miguel Lopez?

A Supervisor.

Q Did you get to know him very well?

A Pretty good. He didn't last very long; about six months.

Q I guess my concern, I don't know if it's the same person, but is there anything about your relationship with Mr. Lopez that would cause you to be unfair to either of these parties, if we were a witness?

A I don't think so.

Q Mr. Ortiz, one of the things that I wanted to talk to you about, I noted that the questionnaire -- I guess the answers were not written by you.

A No, sir.

Q Okay; and what was the reason for this, sir?

A Because I couldn't -- I cannot read -- I cannot spell that well.

Q You can't spell that well, but you had no problem reading the questionnaire?

A A little bit. Some words, I didn't get, but I

[15 RT 1032]

got by.

Q Okay. I note too that -- well, one of my questions to you, sir, if, in fact, you were selected to serve on this jury, if there was any question, you would not be shy, you would ask that question, wouldn't you?

A Yes, I would.

Q If you didn't understand a word?

A If I didn't understand that word.

Q Okay. Now, you have what, three semesters of college?

A Yes, sir.

Q Okay. What college did you attend?

A Palomar College.

Q Palomar?

A Yeah.

Q What was your -- did you have general education, or did you have a major?

A I was just messing around in college –

Q Okay.

A -- just taking little electives, a little woodshop, photography, stuff like that.

Q Okay; and I note also that you graduated from high school.

A Yes, sir.

Q Was that in the United States, or in Mexico?

A In the United States, sir.

Q Okay. Okay. Mr. Ortiz, what I would like to do, sir, I'm going to ask you those questions, those same four

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[15 RT 1033]

questions, because I need to get your answers on my record, okay?

A Okay.

Q Because of any opinion that you may hold concerning the death penalty, in the guilt phase of the trial, would it be difficult for you, or would you automatically vote not guilty of first degree murder, or find the special circumstance not to be proved, no matter what evidence you heard, just to avoid the penalty issue?

A I don't know, sir.

Q Okay. Does that question make sense to you?

A No, sir.

Q Okay. I didn't think so.

What we have -- and if you'll look at the diagram, we have basically two phases of what we call a capital trial, okay --

A Uh-huh (affirmative).

Q --a death penalty trial. The first phase is just like any other trial, whether it's a speeding ticket or a robbery or whatever, and that is what we call "the guilt or innocence phase."

Now, in that phase, evidence is presented, the people have the burden of proving guilt beyond a reasonable doubt. If they do not meet that burden, then the person is found not guilty.

A Okay.

Q My question is, because you know now that this is potentially a death penalty case, in that first phase, in the

[15 RT 1034]

guilt or innocence phase of the trial, would you color the evidence, or refuse to listen to evidence, just so that you wouldn't have to go into the penalty phase?

Would the thought of the death penalty cause you to be biased for, or unfair, in terms of listening to the evidence in the first phase?

A I don't know, sir, to tell you the truth.

THE COURT: Okay. I'll allow counsel to question.

MR. SHEELA: Okay. Thank you.

Examination

By Mr. Sheela:

Q Mr. Ortiz, the questionnaire that was filled out for you has been given to all of the attorneys, so we all have a copy.

A Yeah.

Q And this is my chance to ask you some questions and follow up on the questionnaire, to ask you further questions.

A Okay.

Q And it's -- I think what you told the court this morning is you had someone else write the answers because you were concerned about your spelling?

A Yes sir.

Q With respect to understanding English, spoken English --

A Yeah.

Q -- you don't really have much of a problem, do

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[15 RT 1035]

you?

A Speaking it?

Q No; understanding what -- what I say.

A Oh. It depends if you make long words. If you make -- if you go if you say it straight out, then I might understand.

If you beat around the bush, I won't.

Q I'll try not to talk-- use any legal words or lawyer talk --

A Okay.

Q --and talk regular with you.

If you don't understand anything I say, stop me and tell me, okay?

A Okay.

Q If you're selected as a juror during the trial, and you know you're serving as a juror and listening to witnesses, can we have your promise that if a witness uses a word you don't understand, you'll put your hand up and let us know?

A Yeah.

Q Okay; because it's important that every one of the people that decides this case understands every word that's said here.

A Okay.

Q There's one more problem that you're going to have with me, and that is that sometimes, I get -- probably it's nervousness -- but whatever, I talk real fast, sometimes real fast.

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[15 RT 1053]

can't decide a question because of his strong feelings.

Do you see what I mean?

A Yes.

MR. SHEELA: Objection. That misstates the law.

THE COURT: Overruled.

MR. SHEELA: May I be heard at side-bar, your honor?

THE COURT: No, not at this point.

By Ms. Michaels:

Q That's why I want you to take a moment or two and try to put yourself in that position where maybe three months down the line, after having been with Mr. Ayala every day in this trial, you are suddenly called upon to decide whether he lives or whether he dies, if you can make that decision.

In other words, think for a moment if you will about your feelings about the death penalty.

A I still can't, you know, like-- how can I say it?

It's hard for me to say that.

Q Hard for you to say what?

A Say if it's right for the death penalty, or if it's not, you know, because I do have strong feelings about --

Q You have?

A Yeah.

Q You have strong feelings about it?

A Yeah.

Q Tell me what the feelings are.

A lot of people do, Mr. Ortiz. That's why in this kind of a case, we have people come in alone, so that

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[15 RT 1054]

we can talk to them, because we're talking about life and death --

A Yeah.

Q -- the biggest decision anyone can make, so we want you to really look inside yourself and think about your feelings; and maybe some other case down the hall, a robbery or a burglary, where you don't have to worry about life and death, is a better trial for you, so that's why we have this kind of a questioning, so that you can explore your feelings, okay?

A Okay.

Q Are you with me?

A I think so.

Q All right. Now, how do you feel about the death penalty or executing another person?

A Kind of shaky about it.

Q Can you tell me a little bit more in your own words why shaky?

I just need you to talk to me some more.

A You know, I'm not-- I'm not too sure if I can take someone else's life in my hands and say that; say, you know, "death," or something.

Q That's what I'm talking about. We need to talk about that, and we need to find out how you feel, because if you sit as a juror on this case, Mr. Ortiz, you're going to have somebody else's life in your hands.

A Yeah.

Q You understand that?

[15 RT 1055]

A I understand that.

Q Okay. That makes this case different than other cases, all right?

A (Nods affirmatively)

Q Do you think that if you felt it was correct, do you think that you could vote for the death penalty, or for execution of this man?

A Probably.

Q Do you think you could?

A I think I could.

Q Now, you understand that it's a decision for all the jurors to make?

A Yes.

Q But you're one that has to make it too, because all the jurors must agree.

A That's true.

Q You understand?

A I understand.

Q Okay. Now, let's say that you're at that point, okay?

A All right.

Q You have decided that death is the correct verdict for this particular defendant, okay?

A Okay.

Q You come back into this courtroom, and the jurors say, "yes, death is our verdict." the defense would have the right to call -- have this clerk of the court call out the name of every person on the jury and say, "what is your

[15 RT 1056]

verdict?"

And if she's called out, "Mr. Ortiz, what is your verdict?" would you be able to say, "the death penalty"?

A Yeah. I think I would.

Q You think you would?

A Yeah.

Q Okay. Now, you told us before that it's a little shaky.

A Yeah.

Q Have you come to be more comfortable?

A A little bit, since I'm not the only one, there's three other – there's eleven more other persons on the jury.

Q Right. The only thing about that – and you're right, there will be eleven (sic) of you – it still is your own verdict, because let's say the other eleven voted for the death penalty. If you didn't, there would be no death verdict.

Do you understand?

A Yeah, I understand.

Q So it requires your own personal verdict along with everyone else's.

You understand that?

A Yeah, I understand that.

MS. MICHAELS: Thank you, Mr. Ortiz.

I have no further questions.

THE COURT: Mr. Ortiz, if you would step outside of the court just momentarily and await further direction from the

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[15 RT 1076]

MS. FRANCO: Okay. I have nothing further.

THE COURT: Okay. Miss Ortiz, if you would step down, temain outside just momentarily, await further direction from the court, please.

(prospective juror Ortiz exits courtroom)

THE COURT: Counsel?

MR. WOODWARD: People would challenge Miss Ortiz for her inability to entertain the death penalty.

THE COURT: Miss Franco?

MS. FRANCO: Submit.

THE COURT: I would -- and the record should reflect that Miss Ortiz, by Witherspoon standards, would not be able to carry forward her duty as a juror, or is substantially impaired.

The challenge for cause will be granted.

I note the name Ortiz; Caucasian, Hispanic origin?

MR. SHEELA: Actually, your honor, her ethnic or racial background is Caucasian.

THE COURT: That's the classification for Hispanic, sir.

Caucasian, Hispanic origin.

MR. WOODWARD: I did not observe any Hispanic features, though her name is certainly Hispanic.

THE COURT: I don't know what that would be, sir. I suspect that people from Spain would show less quote "Spanish" characteristics than other people.

In any event --

[15 RT 1077]

MR. SHEELA: It could be her married, name, your honor.

THE COURT: It could be; it may not be, sir, I don't know, but to the extent that the courts, absent a direct inquiry of the prospective juror, typically look to the last name, I would indicate that the last name appears to be Hispanic, and Caucasian, Hispanic origin, female.

You want to have her step in?

(Prospective juror Ortiz enters courtroom)

THE COURT: Miss Ortiz, again, I would like to thank you for the candor in your answers, ma'am.

At this point, you will be excused from further service as to this case. I'm going to instruct you still, the reason we have these sessions in private is because we don't want you to discuss with anyone what we've discussed in the courtroom, okay?

I want you to return at this point to the jurors' lounge. It may well be that you can be assigned out to another case.

PROSPECTIVE JUROR ORTIZ: Okay.

THE BAILIFF: Thank you.

No one is outside, sir.

THE COURT: Okay. I think tomorrow, additionally -- I'm not really sure of which particular jurors, but where there is a clear indication one way or the other, I'll inquire as to either question 3 or question 4, whichever is deemed Appropriate in light of the responses, and then just turn it over to counsel.

MS. FRANCO: I think tomorrow, it's like four out of

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[15 RT 1087]

[Charles Gindt]

A Yes, I can understand that, but I couldn't -- I couldn't judge that way myself, that I would be influenced by another trial, someone else's trial.

I'd only judge by the trial that I'm on.

Q Okay. If -- if you are selected as a juror in this case, and if you were instructed by the judge that because you read the news article or you heard this, that the other people may not have heard it, and that you must do two things, one is not allow in any way your knowledge of that news article to enter into your deliberations, you could follow that?

A Yes.

Q Okay; and number two, that in no way, at any time can you communicate, can you tell the other jurors what you read, could you follow that?

A I wouldn't -- I wouldn't discuss that. I wouldn't tell anyone else what I knew, I think.

Q Okay. Okay. I need to ask you, or I want to ask you some questions about your personal beliefs regarding some statements about the criminal justice system, or we asked you some questions, "Please state your personal belief regarding each of these statements," and the first statement was "The defendant is innocent until proven guilty beyond a reasonable doubt," and you said, "Acceptable popular belief."

A Oh. What was that again?

Q Actually, maybe I better show you, because you can -- this first one A, right here (indicating).

A "Please state your personal beliefs regarding

[15 RT 1088]

each of these statements. The defendant is innocent."

Oh, yes. I have heard that repeatedly, in print, and have seen it in print frequently, and I think

that's the foundation of the justice system, isn't it? He's guilty -- I mean -- pardon me. In the United States Courts, he's innocent until proven guilty.

That's why I said it's a popular belief, and I accept it.

Q Okay. I see. Acceptable, popular belief, and I thought, "He said he doesn't believe it, but other people do."

You believe that is the foundation of our justice system?

A Yes. I accept that.

Q Okay. Let me ask you one other one. Let me have you look at D, and your answer there, if you would,

A D. I don't really -- I don't think I understand that question.

How does it start out? Personal beliefs?

I don't know why I --apparently, I don't understand the question well, and that's for sure.

Q Okay.

A What did I mean there?

Q You have to keep your voice up. Just because I'm close, doesn't mean everybody doesn't have to hear.

I shouldn't be close, because then you just talk to me.

When you wrote down "not technically true," you say you may have been confused by the statement, itself?

[15 RT 1089]

A I think that's the way it-- yes.

Q Okay. Now, let me ask you some questions --

A No, I really don't understand that statement the way it's written.

Q That's not-- you're not the only one who has had trouble understanding some of the statements in the questionnaire.

We asked you about your feelings about the death penalty, and you wrote down, "justifiable in some cases," and what I'd like you to do is expand on that, if you could.

A I'm not absolutely against it. Some people are. They certainly would not approve of taking another man's life, even though he had taken -- that man had taken a hundred other lives.

Some people are dead-set against it --

Q You're not in that group.

A --Capital punishment.

I'm not in that group. I think sometimes, it's justified.

Q What kinds of cases would you say it's justified in?

A Well, I think I wrote that there, that --

Q Well –

A Mass murderers, and obviously a man who is savage, not rehabilitatable.

Q We asked you another question in the questionnaire that asked, "Are there any types of crimes for

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[Title Omitted in Printing]

[16 RT 1132]

[Olanders Dallas]

Q When you filled out the questionnaire, I think you indicated that you had had some change in your feelings about the death penalty.

At least my understanding is that at one time, you felt one way, and -- and then at some point you felt differently?

A Right. Well, to explain it, I'll explain it this way: I think about ten years ago -- I mean, I was wondering whether I was completely against the death sentence, but I think I have changed.

Under certain circumstances -- I think that it would be an appropriate sentence under certain circumstances.

Q Okay. Then when you told us in the questionnaire that you didn't believe in the death penalty -- well, I'll tell you what my problem with the answer was.

I couldn't tell if you were saying, "I didn't used to believe in the death penalty," or "I don't presently believe in the death penalty."

A Well, I'll explain it. During – before --I mean, from a religious standpoint of view, I used to think it was wrong, and then after I looked at it and everything, and looked and really went into it and went over it with people, I think it would be appropriate under certain conditions, right.

Q You're a church deacon now; is that correct?

A That's correct.

Q And there's nothing about your participation in your religion that prevents you from considering the death

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[16 RT 1133]

penalty as an option?

A I don't think so, no.

Q And at one time, you thought that it was completely wrong, and you felt your religious views would prevent you from ever imposing it, but you've changed in that regard, and now you feel that under certain circumstances --

A Right. In the last ten years, I would say that I have changed on that, right.

Q So that now you feel that under certain circumstances, it's a penalty that you could consider?

A I could, right.

Q You have not gone so far in your change of view that you now think that it's always appropriate in certain cases?

A No. I wouldn't say it was always appropriate, no, I wouldn't.

Q Because there was a question in the questionnaire asking whether there were any types of crimes for which you felt the death penalty should always be imposed, and at the time that you filled out the questionnaire, you did tell us that there were not.

You said, "no, there are none," and I take it that you still feel that way?

A Right.

Q Okay.

A That's correct.

Q Let me talk to you a little bit about a chart that's up here on the board, so that I can then ask you a few

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[16 RT 1137]

comfortable with, and that you could follow?

A I can follow it, sure.

I feel sure I could follow it.

Q You have no difficulty understanding the job that you would be taking on, if you were to sit as a juror?

A No, I wouldn't.

Q And you feel comfortable that you could follow the law and do the job that's required of you?

A Sure.

Q Would you mind my asking you this: what do you think caused this change in feeling that you had about the death penalty?

A Well, I think it's -- one thing would be the — the -- I mean, examining it more closely, I think, and becoming more familiar with the laws and the -- and the behavior, I mean, the change in the people, I think.

All of those things contributed to the changes.

Q Okay. Well, I think that it's fair to say that there are a lot of people who feel that violence has escalated, that there are much more serious crimes being committed today, with much greater frequency.

A Right.

Q That's a view that's out there in the community.

A Right.

Q Is it that kind of feeling, do you think, that's maybe caused you to re-evaluate and re-assess your feelings about the death penalty?

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[16 RT 1141]

think so.

Q Anything related to it, the name "Ayala" or Anything?

A I think -- I think I read there was a jury -- it was in the jury stage, picking a jury for it. That's about all I read about it.

Q Then to the best of your recollection, that's all that you can remember hearing about the name "Ayala"?

A Yeah.

MS. FRANCO: I have no further questions. Thank you very much sir.

PROSPECTIVE JUROR DALLAS: Okay.

THE COURT: Mr. Woodward.

MR. WOODWARD: Thank you, your honor.

Examination

By Mr. Woodward:

Q Good morning, sir.

A Good morning.

Q Sir, I want to ask you a few more questions, if I may --

A Sure.

Q -- about your views on the death penalty.

In the questionnaire that you filled out about a month or so ago --

A Right.

Q --You told us, "I don't believe in the death penalty."

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[16 RT 1142]

A That's correct.

Q Okay. Now, when you wrote that, were you talking -- as I'm talking to you now, would you say the same thing, that you do not believe in the death penalty, or that you do?

A Well, that was according just to what I believe; I mean, in the death penalty in that sense, but I think that I had thought during circumstances certain circumstances, I think it would be an appropriate one.

I answered that kind of fast, normally, I wouldn't answer that question that way, but I mean, I really went through that kind of fast.

I should have done better than that.

Q I think what I'm hearing you say, then, is that certainly the death penalty is not the appropriate penalty in all cases.

A Not in all cases, no, sir.

Q But there are cases that you could imagine where that kind of a penalty, the penalty of death, would be an appropriate punishment?

A Yes, sir.

Q Okay. Now, have you discussed -- obviously, you've been doing some thinking about the death penalty over the last ten years or so.

A Right. I have thought about it really quite a bit over the last ten years now.

Q Have you had discussions with anybody else about your views on the death penalty, or have you talked with

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[16 RT 1143]

somebody else about their views about the death penalty?

A Well, it comes up around the home sometimes. My wife and I discuss it.

Q How about with your brother? Have you ever had discussions with him?

A I don't have -- I don't have my brother in California, but we have discussed that, right.

Q Did you find that there was a time when his views and yours were different on the subject of the death penalty?

A Sure, some of them. I mean, I have eight brothers. Sure, sometimes our views are --

Q You do have a pretty large family.

A Yeah. Well, fourteen sisters and brothers, in fact.

Q Okay. Since you've come to the decision in your mind now, as you have progressed through

life, that there are some cases where the death penalty would be appropriate, I want to ask you a question about whether or not you feel that you're the sort of person who could be personally responsible for being on a jury and actually voting for the death penalty in a particular case.

A Sure.

Q Do you think you could do that?

A I do.

Q Now, you recognize that that's a little different than just having a discussion with your family, or say on a ballot in a general election in California --

A Yes.

[16 RT 1144]

Q --checking off and saying, "I'm in favor of a law that says that the death penalty should be used in some cases"?

A It is, yes. It is -- it's a big decision too, I'd say.

Q Okay. Do you believe that your views about the death penalty are at all in conflict with the church that you belong to, and your duties to that church?

A I would say no, sir. I don't think so.

Q Now, in this particular case, we are not talking about just the theory of the death penalty.

A Right.

Q The people are seeking, in this case, first to prove that the defendant is guilty of the charges, murder --

A Right.

Q -- and the people are further seeking to prove in we're talking about the defendant, the man who is right here in this court room --

A Right.

Q -- not some person that you read about in the paper, but a person you see every day while you're a juror – at the end of the presenting all the evidence during the entire trial, phase one and phase two, you can expect that the prosecution will be arguing to you to return a verdict of death.

A Right.

Q Now, do you think that if -- that there are circumstances that you could hear that would actually cause

[16 RT 1145]

you to vote for the death penalty?

A Right, if it was -- if the evidence was clear, and it was in the frame of law, I could do it, yes, sir.

Q Now, you've indicated from your experience that -- there are people with whom you work -- you've been exposed to drugs in your life?

Not you, personally --

A Not me, personally. I mean, I was in the military. I talked to a lot of people that did have drugs, I mean, but personally, I have never used it, no.

Q I didn't -- what I mean is that you've seen the effect on other people that have used drugs.

A Oh, definitely, yes.

Q And would I be safe in saying that you have a negative view about drugs, that they are not good?

A Oh, they are not good, sure.

Q Have you been in a position where you have tried to help other people that were using drugs, to try to get them to stop, or to deal with their own problem?

A I've tried to talk to several people about using drugs.

Q And because of your experience with other people who have used drugs, let me ask you if your

views about drugs are such that if a witness in this trial told you that he or she in the past used drugs, would that make you feel –would that set up some sort of a red flag?

In other words, do you have a strong feeling about anybody that uses drugs that makes you feel that

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San Diego County Superior Court
[Title Omitted in Printing]

[17 RT 1238]

[Luis Macias]

Q Really enough law so that you could perform your job, and know what -- know what to do and how do to it?

A Exactly.

Q With respect to your attitudes on the death penalty, you understand that -- that the reason that we have to ask you these questions now is that if you're selected as a juror in this case, there is a possibility that the case could get to a penalty phase where, as a juror, you would actually decide what penalty is to be imposed?

A I understand.

Q And in asking the questions now, before you've heard any evidence or anything has happened, nobody is intimating in any way that we're ever going to reach a penalty phase of the trial, but we have to weed out the people at this point that, for whatever reason, could not give a fair trial to either side if we got to the penalty phase, so that's why we're asking questions about the death penalty.

With respect to the death penalty and the types of cases that you felt the death penalty was – should always be imposed, we asked that question on the questionnaire, and you said, "In cold blood, when the individual calculated and planned to murder another person."

That was the answer you gave about the types of crimes for which the death penalty should always be imposed.

Could you elaborate a little more on that?

A Let's say a person who does a murder as a -- as a career, or a mafia-type individual. He's getting paid to do

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[17 RT 1239]

that. He has to plan how he's going to do it. He chose to do it, and there's no reason to believe that he's insane at that time, he's functioning, so that I would -- I would conclude, you know, based on that -- of course, it would be more information coming in, but just based on that alone, I might vote guilty, and for the death penalty.

Q Okay. The word that you just used in your answer that I need to find out a little bit more about is "might."

My question really is, is there any type of crime, were you to sit as a juror, th[illegible] by the facts of the crime itself, the type of crime, you would return -- if you found the accused guilty of the crime, that he did it beyond a reasonable doubt, you're convinced, you would always vote for the death penalty in that situation because of the type of crime?

A I couldn't say that I would, because I think every case might be different, a different set of circumstances, different situations taking place, so that I would not always, I don't believe.

Q Okay. That -- that was really the follow-up I wanted to ask you about about this one question, because I know we kind of hid the word in there, but we put "always" in the question to try to find out from jurors if there are some types of crimes that a juror feels, "look, if it's that kind of a crime, I would always vote for the death penalty if I convicted the defendant," and some jurors have put down child molest cases where the child is killed, that that type of case, they would always vote for death.

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[17 RT 1242]

We asked you, at the time you filled out the questionnaire, if you had read or heard anything

about this case, or you remembered reading or hearing anything about the case.

A Uh-huh (affirmative).

Q At that time, you told us no.

Many times jurors, after they've filled out the questionnaire and areawaiting their appointment to come in and speak with us, in their mind, more memories have popped into their minds.

Have any memories come back to you of reading or hearing about the case?

A I do remember talking about it.

In my neighborhood, there are a lot of individuals that are social -- of lower socioeconomic abilities, and some people happen to know the accused, and I just questioned a couple of people, and just as far as the character of the individual.

Q Now, this was back when it happened, or after you got called for jury duty?

A This was after I got called.

Q You asked them about Hector Ayala?

A Yes.

Q What did they tell you?

A The ones that knew, well, there was two different opinions.

Q Okay.

A There was friends of the victims' and then there

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[17 RT 1254]

serves me right, and I've bought items for used cars in some of these areas.

Q Okay. Now, I take it that after you were in court the last time, you had the name of this case, People against Hector Ayala --

A (Nods affirmatively).

Q -- and when you returned to your -- to your home, you told us that you've asked a few people

about what they knew, I guess, about either Hector Ayala or about this case.

A Uh-huh (affirmative), uh-huh (affirmative).

Q Were these people that were in your immediate neighborhood that you asked?

A One individual was within the same block. It was a mother. She used to deliver car parts to this shop, and she tells me that she was informed by other friends not to deliver any car parts to that area, and so she did so.

Q Are you talking about the shop where these things occurred?

A Yeah, exactly.

Q And did it -- did you just happen to ask this person, or did you have some previous knowledge that this person had previously dealt with the area where these crimes happened?

A Well, in a neighborhood such as that, someone is bound to know something, and I felt that she -- she may have known this person, or knew something about the case.

Q Okay.

A And I guess I was curious.

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[17 RT 1259]

juror and not be in a situation where you might feel that some harm might come to you if your decision is one way or the other, and that is to perhaps have some inkling in the back of your mind, some idea that "this particular witness is going to be untrustworthy, the next witness is going to be a trustworthy witness," and kind of maybe subconsciously -- not intentionally, but somewhere back there --

A Uh-huh (affirmative).

Q --kind of hearing the evidence to go a certain way according to the way you would like things to come out.

Do you see what I mean?

A Yeah.

Q Do you think that might play at all a part —

A No.

Q Because of where you live or what you may know about the case?

A I don't believe so.

MR. WOODWARD: Would you excuse me just a moment, sir? Your honor, may we approach the bench just briefly?

THE COURT: With the reporter.

(The following proceedings were held in the back hallway:)

MR. WOODWARD: I don't know what counsel's current feeling is about this juror, but I'm concerned about a juror that would -- that has the knowledge that he has about this case, and I'm willing to stipulate that he be excused, or I

[17 RT 1260]

can continue on, if you're going to challenge him at the end, then --

MR. SHEELA: I'm wrestling in my mind. I don't think that I can say that I -- that I can stipulate to him now, based on cause.

I have the same concerns you do, but there's two people that have already passed through who know that Ronnie was sentenced to death, and everybody seems to think they are fine jurors. This guy is not that bad.

THE COURT: Well, let me indicate just for the record that you can propose the stipulation. I would not accept it at this point.

MR. WOODWARD: All right. Thank you.

(the following proceedings were held in open court in the presence of the prospective juror:)

By Mr. Woodward:

Q I'm sorry, sir, for the interruption.

A That's all right.

Q Your work with the child protective services puts you at least in a way sort of in an investigative capacity.

A Uh-huh (affirmative).

Q And it's probably kind of because of that, that you were curious, I guess, about getting a little bit of information about this case?

A Yeah.

Q Do you think that if you were a juror on this case that you could set aside, at least while you are a juror,

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[17 RT 1262]

racial slurs at least while you were in the service. You mentioned something about a commanding officer --

A Uh-huh (affirmative). Uh-huh (affirmative).

Q -- and this is not -- well, do you perceive of that incident, or racial overtones, if you believe that such overtones may even exist in this case in any way, shape or form, that your own experience would have any effect in evaluating the evidence?

A No.

Q And how long, altogether, were you in the service?

A Two years, '74 to '76.

Q Okay; and in that time, other than what you wrote down -- I'm sure you did not write down virtually everything that you might ever construe as a bias of one sort or another against Hispanic persons or any other race for that matter --

A Uh-huh (affirmative), uh-huh (affirmative).

Q --Would you say that you have encountered perhaps against yourself and other people, of majority or a minority persuasion, some form of racial prejudice or bias?

A Personally speaking, I think I've rather been lucky. I've not been actually insulted, had a face-to-face situation.

Most of the racism I've seen is based on what I've seen on television.

Personal experiences with law enforcement have not been that negative.

Q Uh-huh (affirmative).

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[17 RT 1272]

[Ana Luciani]
would cause you to be unfair to either of these parties?

A No.

Q Did you recognize any other names?

A No.

Q Okay. What I would like to do is to deal with the questions that you've had an opportunity to review.

Because of your opinion concerning the death penalty, if the jury were to find Mr. Ayala guilty of murder in the first degree, and further find a special circumstance to be true, would you always vote for life without the possibility of parole, and refuse or find it difficult to vote for death, no matter what evidence was presented to you?

A I would have to listen to the evidence before could say --

Q Okay.

A -- yes or no.

Q Because of your opinion concerning the death penalty, if the jury were to find Mr. Ayala guilty of murder in the first degree, and further find a special circumstance to be true, would you always vote for the penalty of death, and in the penalty phase, refuse or find it difficult to consider life without the possibility of parole, no matter what evidence you may hear?

A That's about the same: I would have to listen to the evidence --

Q Okay.

A -- to come to a decision about that.

[17 RT 1273]

Q Okay. Because of any opinion that you may hold concerning the death penalty, in the guilt phase of the trial, would it be difficult for you, or would you

automatically vote not guilty of first degree murder, or find the special circumstance not to be proved, no matter what evidence you heard, just to avoid the penalty issue?

A I wouldn't avoid the penalty issue. Like I said before, I would have to listen to the evidence in order to come to a decision on that.

THE COURT: Okay. Thank you, ma'am.

Miss Franco.

MS. FRANCO: Thank you.

Examination

By Ms. Franco:

Q Good morning, Mrs. Luciani.

A Good morning.

Q Miss Luciani, we have had an opportunity to review your questionnaire, so that we don't have to go into every aspect of it here during this session.

There are of course responses that we do want to pursue in a little bit more detail, and it's those areas that we are going to be focusing on here, and in listening to your responses to the questions that the court just propounded to you, I get the sense that what you're saying is, "I think I have some strong feelings in the area of the death penalty; however, I will not say that those feelings are so strong that I wouldn't be able to listen to all the

[17 RT 1274]

evidence and all the facts and circumstances that are involved in this case that I might sit on as a juror."

Would that be a fair summary?

A That is correct.

Q Okay. Now, prior to the time that you filled out this questionnaire, do you think that you had really had an opportunity to sit down and mull over what exactly your feelings about the death penalty might be?

A Well, I strongly -- up to then, I did not believe in the death penalty.

Q Up until the time you filled out the questionnaire?

A The application, yes --

Q Yes.

A --Filled out the questionnaire.

Q So when you responded, for example, in the questionnaire -- let me direct your attention specifically to one of the last questions that was asked in the questionnaire, which was, "after having completed this questionnaire, is this a case in which you would like to serve as a juror and why?" and at that time, at the time that you filled out the questionnaire, you said, "no," that "this is not a case I would want to serve as a juror on," and you said if you were selected as a juror and all of the other jurors voted for the death penalty, you probably would not be able to vote for the death penalty.

At the time that you filled out the questionnaire, you sort of had some sense that that might be

[17 RT 1275]

your view?

A That is correct.

Q Okay; and since that time, you've thought about this a little bit more and tried to gel in your own mind what your feelings exactly about the death penalty really are; is that fair?

A That's true.

Q That's because now, it's not just an abstract notion and belief, but it actually may have to be used--

A Right.

Q -- is that right? All right; and in the time between the time that you filled out the questionnaire and today's date, you feel that .your

view has --has actually changed, that is from a person who could not impose the death penalty or probably could not impose the death penalty to a person who under the appropriate circumstances could?

A I thought about it a great deal.

Q Okay. Why don't you tell me a little bit about what that thought process was.

A Up to then, I did not believe in putting someone to death.

Q Okay.

A But being that you've given me the -- the opportunity to come over here, seeing something that is not correct in the system, it wouldn't be no problem (sic) for me to give to come to a decision on the death penalty anymore.

Q Okay. Let me see. Maybe I can ask you to explain what you mean by giving you the opportunity to come.

[17 RT 1276]

Do you mean to serve as a juror?

A To serve as a juror, yes.

Q Is it anything -- is it something about this case in particular that you think has caused you to have this change of view, or is it just generally society?

A It's not this case. It's just society in general.

Q Have you talked about -- have you talked to anyone about the death penalty, had some questions--

A No.

Q -- since you filled out the questionnaire?

A No, I haven't.

Q Not at all?

A No.

Q Have you done any research on it, or done any reading?

A No.

Q Just thought about it?

A Just thought about it. I haven't even researched anything, even picked up a book on the death penalty or anything.

Q You're aware of the nature of the charges in this case, are you not?

A Yes.

Q You've heard the clerk read the information that says that --

A Right.

Q -- Hector Ayala is charged, accused in this case

[17 RT 1277]

of having committed three murders, there are other charges contained in the information, and then additionally, two special circumstance allegations, that is, allegations that would cause the possible penalty of death to be triggered?

A Yes.

Q Is there anything about that fact that you think might have caused you to have this change of view with regard to the death penalty?

A It wasn't what was said here in court, actually.

Actually, it was what was said in court that triggered me to start thinking.

Q Okay. Was it the charges that started you to start thinking?

A Yes.

Q You thought --well, let me ask you this: did you think, "well, if those charges are true, then maybe there is something to this concept and notion of the death penalty"?

A I didn't think that way. The only thing that I thought about was the death penalty given to this man, and what my reaction would be at the time.

Q Okay. What would it be?

A On that first day that I was here, my first thought was, "No, I don't want to serve, and in this particular case," but then I started to thinking more and more and more about it, and it wouldn't be any -- listening to the evidence, I would have to come to a decision if he is guilty or if he is not guilty.

Q Okay.

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[17 RT 1281]

A Yes.

Q At the time that you filled the questionnaire out, your feeling was that you didn't believe in taking a life; however, you did believe in the possibility of parole -- life without the possibility of parole, and that penalty, and I think what you're saying now is not that you don't believe in life without the possibility of parole, but that you can conceive of situations where even the death penalty would be appropriate.

A Yes.

Q You're not telling me now, however, that as you sit here today and look at my client, Hector Ayala, that it's only his case, or only the charges that have made you feel that way?

A You made me think about it, by being a juror.

Q Right; so to that extent --

A To that extent, that's what triggered it.

Q He does have something to do with it. You are not sitting here thinking, "oh, somebody that looks like that, yeah, I could be in favor of the death penalty"?

A Oh, no. No way. No.

Q Okay. You do apparently get the news daily--

A Yes.

Q -- from what you told us in the questionnaire. I think at the time that you filled the questionnaire out, you said that you did recall at some point in the past having heard something about this case?

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[17 RT 1295]

injuries.

And you have a clear recollection of what those feelings are like, and indeed told us that years ago when you saw this on the news you had a sadness. You're a person that does feel for other people, and you felt very badly for these people who had been killed and were being wheeled out. Anything about that that makes you think that your feelings about victims and -- and being a victim yourself would impede your ability to be an objective fact finder as a juror?

A No, it wouldn't.

Q Anything about the nationality or -- or race of the people who were involved in your purse snatch that would make you be less than fair and impartial in this case?

A No.

Q At the time that you filled the questionnaire out, your feeling was that really you didn't want to serve as a juror in this case. If you were to be asked the same question today, "is this a case in which you would like to serve as a juror?" what would your response be?

A No, I would not.

Q Still wouldn't?

A No.

Q Can you tell me why, even though your feelings about the death penalty have changed, you would still prefer not to?

A That is correct

Q Can you tell me a little bit about why that might

[17 RT 1296]

be?

A It would put a lot of strain on-- on me. That's the only thing.

Q It's a big job?

A That is correct. And I have a lot of outside activities, also, that would -- (pause.)

Q All right So if you had a choice, your choice would be not to serve?

A That is correct.

Q However, if you were selected as a juror in this case you would serve to the best of your ability?

A That is correct.

MS. FRANCO: Thank you very much.

PROSPECTIVE JUROR LUCIANI: Uh-huh.

THE COURT: Miss Michaels.

MS. MICHAELS: Thank you, your honor.

Examination

By Ms. Michaels:

Q Good morning, ma'am.

A Good morning.

Q Can you pronounce your last name for me?

A Lu-chi-an-nie (phonetics, Ana Luciani.

Q One or two questions about the robbery that occurred on Marlborough street. Was somebody arrested?

A No. They were not able to catch the two men that snatched my purse.

Q There were two involved?

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[17 RT 1297]

A Yes. Well, there were two at the time standing talking, and one just walked across the street and that -- that was the one that snatched my purse; and then when he snatched, the other one across the street said, "run, run," to that effect.

Q So there were two involved?

A Yes.

Q And neither one was arrested by the police?

A No. Someone else was arrested because they were trying to cash a check and they called my home. My mother answered the phone and she says, "no, she hasn't written any checks; I know that," and when I called my mother to be aware that my keys were in my purse, my checking account, my address, she told me about the incident about cashing the check. And I called the people, which was not too far from us, and told them to stop, don't give out the money because there is a robbery.

That's when they called the police and the police caught one of the men, but it was not the right person that snatched my purse

Q All right. It wasn't one of the robbers, but it was somebody who had somehow gotten ahold of a check?

A Right.

Q In the purse?

A Right.

Q Did you ever go to court to testify in that case?

A No.

Q Do you know what happened to that particular defendant?

[17 RT 1298]

A No.

Q Do you know what happened to that particular defendant?

A They let him out. It was his first offense. They let him out on good behavior. I guess that's what you call it.

Q All right. Did you call somebody in the district attorney's office or -- or some other agency to find out what the end result was?

A Yes.

Q Do you remember who you called?

A No, I don't. I have it written down, but I don't have it with me.

Q Okay. Is there anything at all about that incident -- do you think that the district attorney's office handled it fairly?

A I presume as fairly as they could.

Q All right. Anything about the way the police handled it? Do you think that they handled the situation, the investigation, whatever, fairly or as best they could; or do you think they could have done more?

A Oh, yes. They did.

Q You think they did all right?

A Yes. Yes.

Q Your nephew who worked at the jail. I think you told us that he had never spoken to you directly about his job. Did you ever indirectly hear anything about things that occurred in the county jail from him?

[17 RT 1299]

A No. No.

Q You told us that in terms of whether or not a defense is presented in this case, that if the case were one-sided that you may feel that it wasn't fair. Do you recall saying that?

A Yes.

Q You understand that, as the district attorney's office or the prosecution in this case, we would have nothing whatsoever to do with any

decision relating to a defense in this case? Do you understand that?

A Uh-huh. Yes, I do.

Q And so if the defense in this case chose not to present a defense, would you have any feeling that somehow we were being unfair to this defendant?

A No.

Q One more thing -- subject, and that is the subject of the death penalty. Reading your questionnaire it looked like you were a person who was against the death penalty.

A Yes.

Q You told us that it was not-- you didn't feel it was correct to take another person's life and that you felt the death penalty was used too often. Do you recall that?

A I don't recall saying that I -- it was used too often.

Q All right.

A I remember saying that I didn't believe in the death penalty.

[17 RT 1300]

Q If I may, just to show you a copy of the questionnaire. It was actually a blank that you checked. (handing document.)

A Okay.

Q Do you recall that?

A Uh-huh.

Q Do you still feel that way?

A (no audible response.)

Q That the death penalty is used too often?

A No, it's not.

Q When you filled this questionnaire out, when you completed it you were against the death penalty, right?

A (nods head affirmatively.)

Q What happened?

A After that I did listen to the Bundy evidence that was said and his being put to death, and I started to think; and I said if they were guilty maybe there is a death sentence for these people.

Q And so you approved of that execution?

A Yes, I did.

Q All right. Was this something that you had just really not thought about until after you were forced to really explore your feelings, fill out this questionnaire?

A That is correct. I would not explore --

Q On your own?

A -- on my own about this unless somebody asked me to.

Q And after thinking about it you feel that you

[17 RT 1301]

could in fact personally impose the sentence of death in a case if you felt it was appropriate?

A If it was appropriate, I would not oppose it, not now.

Q You would not oppose it.

Let me take you a step further, because of course it is our position that you will in fact in this case-- if you're seated as a juror will have the decision of whether this defendant lives or dies, and that is when you decide the penalty of life without parole or the death penalty.

If you feel that after hearing all the evidence during the guilt phase and the penalty phase that death is the appropriate verdict, you would have to do more than simply not oppose it, you would have to affirmatively vote for death. Do you understand that?

A (nods head affirmatively.) Yes.

Q Do you believe you could do that?

MS. FRANCO: Well, your honor, I'm going to object to that as asking the juror to prejudge the case.

PROSPECTIVE JUROR LUCIANI: That's what I was going to do, I would not be able to tell you --

THE COURT: Phrase the question in a hypothetical sense.

PROSPECTIVE JUROR LUCIANI: I would not be able to tell you --

THE COURT: One second, ma'am, while she asks the question.

[17 RT 1302]

By Ms. Michaels:

Q Mrs. Luciani, if you felt that at the close of all the evidence in this case, guilt phase and penalty phase, that the death penalty was the appropriate verdict, the correct verdict for this defendant, would you yourself be able to actually vote for that penalty of death?

A Yes, I would.

Q Taking you one step further, you understand that it is of course a unanimous decision. And I don't mean to harp on it so much, but the reason we're asking you these questions now is because we need to know now; and I understand that I'm putting you into a position where you have to-- it's an abstract situation, not a real situation, but we won't be able to talk to you about it later, so we have to explore as deeply as we can now.

Let's assume for a moment that all the jurors have voted for the death penalty for this particular defendant; and this court will instruct you that, if you do that, death in fact means death, that he will in fact be executed. Do you understand that?

A Yes.

Q All right. You have voted for the death penalty. After reviewing and discussing all the evidence, all the jurors feel it's appropriate. Everyone agrees. You come in. The foreman it may be you - of the jury announces the verdict of death.

The defense would then be entitled to have the jurors polled, each name called: "Mrs. Luciani, is that

[17 RT 1303]

your verdict, the verdict of death?"

A I would have to answer "yes" or "no" depending on what we agreed in the -- in the room.

Q Assuming that your verdict was in fact death, would you be able to say, "yes, my verdict was death"?

A Yes.

Q You sat on a -- a rape jury in 1984?

A Yes. Yes.

Q Was that in this building?

A Yes.

Q I think you told us on the questionnaire that was a civil case?

A It was in the municipal court. I'm sorry.

Q That's -- was it downstairs, you think, on the second floor or -- if you remember?

A It was with judge Greer.

Q Okay.

A Wherever he is.

Q Okay. All right. You still remember the judge?

A Yes.

Q He has quite a personality, doesn't he?

A (no audible response.)

Q Anything at all about that particular trial that would cause you to rather not sit on another criminal case?

A It was very traumatic for me after we reached a verdict.

Q Anything that remains with you?

A Yes. Up to the point that we reached a verdict,

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[17 RT 1304]

there was no feelings at all. You know, it was just listen to the evidence and -- but then the gentleman that was being tried tried to run away from the court, and that just made an impression on me.

Q The fact that he -- that he--

A That he tried to run. As a matter of fact, he ran out of the door and into, the hallway.

Q And was he brought back?

A Yes.

Q Do you think it was -- it was that incident, the way he reacted, that was upsetting to you?

A Yes, it was.

Q Anything at all about that that you think may impact you in terms of an objective analysis of the facts in this particular case?

A No.

MS. MICHAELS: Okay. Thank you, Miss Luciani. I have no further questions.

THE COURT: Ma'am, if you would step outside. Await further direction from the court.

PROSPECTIVE JUROR LUCIANI: Okay.(exits courtroom.)

THE COURT: Counsel?

MS. FRANCO: Pass for cause, your honor.

MR. WOODWARD: People pass.

THE COURT: Do you want to have her step in.

THE BAILIFF: (complies.)

Prospective Juror Luciani: (enters the courtroom.)

THE COURT: Mrs. Luciani, you will be hearing from the

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[17 RT 1324]

(Prospective juror Echon enters courtroom)

THE COURT: Mr. Echon, you're going to receive your card, sir. I want you to go back to the

jurors' lounge, and you're going to be assigned out on a different case, okay?

You have a good day, sir, and thank you for your patience.

PROSPECTIVE JUROR ECHON: Okay. Thank you.

(prospective juror Echon exits courtroom)

THE COURT: Filipino?

MR. SHEELA: Yes, your honor.

THE BAILIFF: Miss Chambers is out there, sir.

MR. SHEELA: Your honor, we did not say this morning when we excused Mr. Cracolice that he was a white male.

THE COURT: That's correct. Okay.

(prospective juror Chambers enters courtroom)

Bette Chambers

Examination

By the Court:

Q Good afternoon, Miss Chambers.

A Hi.

Q How are you doing, ma'am?

A Fine, thank you.

Q Good. I'm going to ask you to relax, get your purse off your shoulder and sit back.

A Okay.

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San Diego County Superior Court
[Title Omitted in Printing]

[18 RT 1497]

[Lois Bruhn]
prosecution is, in fact, seeking the death penalty, had you given any thought to how you would personally react, or how you could personally deal with making a decision of this type, a decision with regard to somebody else's life?

A No.

Q Before you came into court, you had not thought about that?

A No, other than the fact that you do what you have to do.

Q Okay. Since the time that you came into court and you learned through the questionnaire and the statements that the judge has given you, and you recognized -- you knew that we were going to be asking you questions about the death penalty and about your views towards that, have you done any searching on your own to see if there's any difference in your attitude towards the death penalty between, on the one hand, it being a good idea, something that you can vote for on a ballot, and on the other hand, being a person who is a juror, who is one of twelve people being asked to actually render that verdict?

A Uh-huh (affirmative). Yeah. I thought about, "would I be able to, if" -- "if I was called upon to do it?"

Q And?

A And I would be able to.

Q You think you could?

A Yes.

Q And do you think that even in a situation where you've heard the evidence-- and let assume that you have

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San Diego County Superior Court
[Title Omitted in Printing]

[19 RT 1672]

possibility of parole, and refuse or find it difficult to vote for death, no matter what evidence was presented to you?

A Yes, I will.

THE COURT: Okay.

MR. SHEELA: May we approach the bench?

THE COURT: Okay.

MR. SHEELA: This can be without the reporter, your honor.

THE COURT: Okay; without the reporter.

(Discussion in back hallway, off the record)

THE COURT: Mr. Cosca, initially allow me to thank you, sir, for your candor. It's very important to our justice system that we have honest people, and you have been candid with the court.

Because of your response to one of the questions it would appear that you could not be fair to both sides in this particular case, and because of that, I'm going to excuse you from further service as to this case only.

I want you to receive your card and return back to the jurors' lounge. It may well be that you'll be sent out on another case that is not a death penalty case.

PROSPECTIVE JUROR COSCA: Okay. Thank you very much.

(Prospective juror Cosca exits courtroom)

THE COURT: The record should reflect that in discussion with all counsel at side-bar, there was an agreement that there may well be a very real problem in terms of understanding and comprehension by Mr. Cosca.

His questionnaire would seem to bear that

[19 RT 1673]

out, as well as the answers in terms of the questions directed by the court, in contrast to the answers that were placed in the questionnaire, and based upon that, counsel stipulated that Mr. Cosca be excused as a juror in this case.

Is that basically accurate?

MR. SHEELA: Yes, your honor.

MS. FRANCO: Yes, your honor.

MR. WOODWARD: That's correct.

THE COURT: Counsel also agreed that the court could basically enter into the litany as to the reason for the excusal.

MR. WOODWARD: Yes.

MS. FRANCO: Yes.

MR. SHEELA: Yes.

THE COURT: Do we have the questionnaires?

THE BAILIFF: Yes, sir.

THE COURT: Filipino male.

MR. SHEELA: Yes, your honor.

THE COURT: Okay. We have to wait for Mr. Bourgault?

THE CLERK: He's on his way.

(prospective juror Bourgault enters courtroom)

Robert Bourgault

Examination

By the Court:

Q Good afternoon, Mr. Bourgault.

A Hi.

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San Diego County Superior Court
[Title Omitted in Printing]

[20 RT 1778]

[Dorothea Levy]

Q We asked you about your feelings about the death penalty, and you said, "I am in favor of it,"

and I wondered if I could get you to expand on that a little bit.

A Well, I think it's an acceptable penalty under certain circumstances.

Q Is there any -- we asked you this question and you answered, "not sure," so let me -- let me phrase it differently.

We asked you a question: are there any type of crimes, any specific crime category that is such a -- that you feel so strongly about the crime that you feel that the death penalty is always the' only appropriate penalty for someone that's convicted of that type of crime?

A I don't think so.

Q Okay. That kind of is something that the judge addressed this morning in his questions, which is to find out if you're the kind of person that as a-- has such a strong feeling one way or the other on the death penalty that it would prevent you from hearing and considering evidence that might push you towards death or towards life if we were to get there, and your answers to those questions were that you wouldn't automatically reject any evidence?

A No.

Q Is that correct?

A (shaking head negatively.)

Q We asked you about your feelings on the death penalty changing in the last 10 years, and you said, "Yes. I've become harsher in my opinions towards criminals."

[20 RT 1779]

Can you focus on anything that may have caused you to change that opinion?

A Nothing personal.

Q Nothing personal that happened to you?

A No.

Q Media accounts?

A Probably influenced.

Q We've had people -- some people have said that -- that some highly publicized death penalty cases were the type of thing that caused them to change their opinion. Would -- is there any of that that's caused you to change your opinion?

A Well, the Bundy case, I suppose.

Q Had your opinion changed before the Bundy case, or was the Bundy case kind of cementing your opinion?

A It was cementing it, I think.

Q Your feelings on the death penalty having become harsher towards criminals, is there anything so strong in those feelings now that if you were to sit in a case like this and if you were convinced -- if the prosecution convinced you that Hector Ayala was not only a criminal but that he committed the crime of murder that you would be -- your mind would be closed to considering the punishment of life in prison without the possibility of parole?

A No.

Q We -- this is -- I've gone through several of these questions one after the other.

The next question we asked is, "do you feel the death penalty is used too often or too seldom?" and you

[20 RT 1780]

checked, "too seldom," and said, "the death penalty when used is subject to such long delays that it becomes less meaningful." did you mean by that that-- that there's delays after a verdict, after a jury?

A After the verdict.

Q Okay. And -- do you -- what do you -- what do you attribute that to? Anything in particular?

A I don't know.

Q Okay. It-- if -- what I -- what I need to -- I guess to ask you is is there anything about that

feeling, that it's seldom used and it's an after-- that it's an after-the-verdict situation that these delays happen that would cause you to be unfair to one side or the other in this trial because of those feelings?

A I don't think so.

Q Okay. You -- you personally have been the victim of I think you said two burglaries?

A Yes.

Q As well as verbally assaulted by a parent of a child that you were teaching, I guess?

A Yes.

Q Were the police summoned in any of those occasions.

A In the burglaries.

Q Did -- was anyone ever apprehended or --

A Not that I know of.

Q Okay. Were you generally happy with the way the police handled the case?

[20 RT 1782]

Is there anything about your attitudes on the death penalty, the criminal justice system or anything that would make you closed to the presentation of evidence either in aggravation or in mitigation?

A I don't think so.

Q If at the end of the case you had heart the evidence and you were convinced that death was an appropriate punishment, could you return that verdict?

A I think so, but I don't know until I have to do it.

Q Okay. That's-- that's a reluctance or a reticence that other persons have expressed, that they're despite the fact that --that they say -- that they say in the abstract they believe in the death penalty, that they say, "well, you know, it's"-- they may find it difficult to do personally if they were

convinced of that. And is that kind of what you're expressing?

A Yes.

Q If you were selected as a juror, you understand that -- that you'd have to follow the law?

A Yes.

Q And if the law -- if based on your reading of the law coupled with the evidence you determined that was -- that was the verdict, in a way the law would have compelled your verdict, so you could feel a little better about it. Do you understand that?

A I understand.

Q Okay. If at the end of the case--

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[20 RT 1788]

execution or the potential execution of another human being, because that is so much more grave and serious we take this more elaborate procedure so that we talk to you alone so that you feel 100 percent comfortable and honest in telling us how you really feel about the death penalty in this situation.

We need to get an answer also from .you now, because once you find yourself in the position where you're deciding life and death and all of a sudden you realize, "maybe from a societal perspective I am for the death penalty, but I simply cannot personally impose it on another human being," that would be too late. So I'm going to ask you to look inside yourself now as I ask you some questions about whether you personally can impose the death penalty. All right?

A All right.

Q Okay. Let's assume that you're at that point and you've convicted this defendant of at least one count of first degree murder and you have found the special circumstances to be true. You are now in the penalty phase. Should you decide after hearing all the evidence in both phases of this case that the

death penalty is the appropriate punishment for this defendant, will you yourself be able to come into this courtroom and announce that your verdict is one of death?

A I think so.

Q You think so. Do you have any doubt as to whether or not you could do that?

A No.

Q Do you understand that this court will never

[20 RT 1789]

instruct you that you must impose the penalty of death; it will always be a choice for you to make within your own conscience and the evidence that you hear in the penalty phase? Do you understand that?

A Yes.

Q Understanding that you will never be required to vote for the death verdict, do you feel that if you -- after evaluating and assessing all the evidence you felt that the evidence in aggravation about this particular defendant substantially outweighed that in mitigation, you felt that the death penalty was appropriate, could you make that your choice?

A Yes.

Q And could you come in and if you were polled individually, your name was called, could you announce to this defendant, "my verdict is the death penalty"?

A Yes.

MS. MICHAELS: Thank you I have no further questions.

THE COURT: Miss Levy, if you would step outside of the court just momentarily, ma'am, and await further direction from the court, please.

PROSPECTIVE JUROR LEVY: Okay.(exits courtroom.)

THE COURT: Counsel.

MR. SHEELA: Pass for cause, your honor.

MR. WOODWARD: Pass.

THE COURT: Okay. Would you have her step in, please.

PROSPECTIVE JUROR LEVY: (enters the courtroom.)

THE COURT: Miss Levy, you will be contacted by the

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[20 RT 1826]

THE COURT: People have a motion?

MR. WOODWARD: I see room for compromise.

MR. SHEELA: Room for improvement.

MS. FRANCO: Ask the same question twenty times.

MR. SHEELA: We make a challenge for cause under -- under Witt, Witherspoon or every other standard you can think of.

THE COURT: People have comment?

MR. WOODWARD: No.

THE COURT: The defendant's motion pursuant to Witherspoon and Witt will be granted.

This juror would be substantially -- well, he would be incapable of performing his job as a juror.

You want to have Mr. Chin step in, please?

(prospective juror Chin enters courtroom)

THE COURT: Mr. Chin, allow me initially to thank you for your candor, sir.

I can assure you that our system of justice just would not function unless we had honest potential jurors, and you certainly are that.

Because of your responses, because you would be unable to be fair to both sides, you will be excused from further service as to this case.

However, I want you to report back to the juror's lounge. It may well be that you'll be assigned out on another case.

Another thing I would remind you of, sir. What we've discussed here in private -- the reason we do that

[20 RT 1827]

is because it's not to be discussed with anyone: family friends, whatever, and i'll direct that you continue to abide by that order, not discuss what we've discussed with anyone, okay?

Have a good afternoon, sir.

PROSPECTIVE JUROR CHIN: Okay.

(prospective juror Chin exits courtroom)

THE COURT: Chinese male.

Do we have the questionnaires?

THE BAILIFF: Yes, sir.

MR. SHEELA: We do.

Your honor, both of the young ladies in the front row of the courtroom are law clerks that work for my office.

In the peach is Laurie Campanella (phonetics); in the beige is Pat Zale (phonetics).

THE COURT: How are you doing?

How are you doing?

THE BAILIFF: Mr. Coleman is outside.

MR. SHEELA: I thought Miss Chavez was next.

THE CLERK: She has not checked in.

THE COURT: Mr. Coleman is again a 3 question?

MS. MICHAELS: Yes, I remember this one.

THE COURT: You remember Mr. Chin too?

MS. MICHAELS: Yes, right.

At first, I thought it was language.

THE COURT: With a master's degree from Adelphi?

MS. MICHAELS: That's right.

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San Diego County Superior Court
[Title Omitted in Printing]

[22 RT 2090]

[George Stamos]

Q Okay. It was.

Basically, what I'm referring to is the first phase of the capital trial.

Counsel will explain this to you in more detail, but basically the first phase, what we call "the guilt or innocence phase," is just like any other trial. It's what any other juror would do. You come in, you listen to the evidence, and based upon your evaluation and assessment of that evidence, you return a finding of either guilt or not guilt, depending on what you determine, okay?

A Uh-huh (affirmative).

Q My question is, because this particular case also involves the possibility of the death penalty, would that fact, the possibility of the death penalty, cause you to be biased, or skew the evidence that came in during the course of the trial?

A No.

Q Okay. Because of your opinion concerning the death penalty, if the jury were to find Mr. Ayala guilty of murder in the first degree, and further find a special circumstance to be true, would you always vote for the penalty of death, and in the penalty phase refuse or find it difficult to consider life without possibility of parole, no matter what evidence you may hear?

A No.

Q Because of your opinion concerning the death penalty, if the jury were to find Mr. Ayala guilty of murder in the first degree, and further find a special circumstance

[22 RT 2091]

to be true, would you always vote for life without the possibility of parole, and refuse or find it difficult to vote for death, no matter what evidence was presented to you?

A I'm going to need that one rephrased.

Q Okay. Because of your opinion concerning the death penalty, would you always vote for life without possibility of parole, and refuse or find it difficult to vote for the death penalty, no matter what evidence was presented to you?

A No.

THE COURT: Mr. Sheela.

Examination

By Mr. Sheela:

Q First of all, is it Stamos (pronouncing) or Stamos (pronouncing)?

A Stamos.

Q Okay. That would be my guess.

The essence of the questioning about your attitudes on the death penalty is designed to determine whether your feelings either in favor of the death penalty or against the death penalty are so strong that you could not give a fair trial to either side, either the guilt phase of the trial, or if we ever got to the second phase of the trial, the penalty phase of the trial.

There are some people whose feelings are so strong against the death penalty, and they are so afraid of ever having to sit on a case where they might have to vote for

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[22 RT 2099]

Q Do you remember what it said?

A something with the name "Ayala," and something with a conviction, and then I stopped.

Q Okay. Anything about that that would make you think you could not be fair to either side in this case?

A No.

Q Let me get to the answer that I -- that I really was interested in.

We asked you, "What's your best recollection of how you read or heard about this case?"

"The front page of this questionnaire," and the next question, "What did you think or feel when you read this?" answer, "You probably don't want me." why did you say that?

A Well, after I -- after -- well, there are a lot of reasons, and as I progressed through the questionnaire, I kept thinking of a lot of the reasons; that first of all, in my employment, you know, when I look at the length of this, and I think, you know, as a school teacher, and -- and English department chairman, you know, all the things -- all the distractions that I have, that you know, these things begin to weigh, and I begin to -- to concentrate on those things, and that's -- that's one reason.

A second reason is that before I looked over the list of people here-- I'm a native San Diegan, and I grew up on Market Street, went to Sherman Elementary School. As I looked over these names -- and I said earlier that I don't think I know these people, but that as we get closer

[22 RT 2100]

through this -- to this, then I was thinking that -- that perhaps that you know I might find that. I either know people or know families, or whatever.

Now, because of the restrictions that I've taken very seriously, I haven't talked to anyone and said, "by the way" -- and that's why I answered that question, the job considerations, my own background, also, in my experience as far as being on a jury

before, I have been on the one--eleven-one decision. Now, it wasn't monumental, because I think we only needed – it was a while back -- nine concurrences. It's easy to be one, I think, at that time, but those are considerations I thought you folks should know about.

Q That was a civil case, where you were assessing damages; is that correct?

A Yes.

Q There are a couple of other areas that I wanted to inquire about.

First of all, connections with law enforcement.

You indicated that you applied to the San Diego Police Department?

A I did

Q I guess after you came back from Vietnam?

A Yes, I did. I was trying to get out of the Army.

Q Oh. I didn't know that that was a way.

And you also said that -- you also put down that you have a friend or relative that works with the FBI and

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[22 RT 2108]

turn-around or something in order to avoid dealing with that issue?

A I think it would be very difficult for me to do.

Q Do you think that part of that difficulty -- I notice that in the questionnaire that you -- that you filled out, that there were several times that you used quotations from the Bible, and one of the quotations that I recall you used was, to paraphrase, it is not really your job to judge, it's up to God.

Do you believe that?

A Yes. I think what I said was, vengeance.

It was an eye-for-an-eye and a tooth-for-a-tooth question.

Q Right.

THE COURT: Mr. Woodward, one second, please.

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[22 RT 2109]

San Diego, California- Wednesday, 3-14-89 - 10:30 a.m.

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George Stamos

Examination

By Mr. Woodward:

Q In -- in that -- actually there were several different places in the questionnaire where we also had quotations and so forth. Do you see that at least to the extent that you would be a juror making possibly an ultimate decision, the life or death of somebody else, that doing that is going to come in conflict with any of your beliefs?

A I would -- yes, I would hope so. I would think so.

Q And that conflict, to the extent that it exists in your mind, do you think that there's a real possibility that that conflict would interfere with being a juror who can really render what may be an appropriate verdict in this case, whatever that verdict may be?

A Yes. I would think so.

Q Are you telling us, Mr. Stamos -- Mr. Stamos, that as far as being a juror is concerned, if the death penalty were not the issue, if it were simply judging the guilt or innocence of a defendant and that you would never have to approach that ultimate question, that you could be a completely fair and impartial juror?

A Yes. I would -- I would hope so.

Q But that the further duty that you may have to

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San Diego County Superior Court
[Title Omitted in Printing]

[23 RT 2340]

reason for that. It's not to be discussed with anyone; family friends, other prospective jurors.

I would also again re-emphasize the court's previous order. If you see or hear anything that even remotely reminds you of this case, you're to completely disregard it, okay?

Have a good afternoon, ma'am.

PROSPECTIVE JUROR WALKER: Okay.

(prospective juror Walker exits courtroom)

THE COURT: For the record, I would indicate that Miss Walker is a black female.

MS. MICHAELS: She's black?

THE COURT: Would you like to find out?

MS. FRANCO: Do you know her?

THE COURT: No, but I know she's a black female.

MR. WOODWARD: I'm not going to challenge the judge's judgment.

MS. FRANCO: No, but --

THE COURT: Well, let's -- this is a record.

What did you think she was?

MS. FRANCO: Let me go off the record.

When I --

THE COURT: Off the record.

(Discussion off the record)

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San Diego County Superior Court
[Title Omitted in Printing]

[25 RT 2508]

to every story. What you've stated is certainly not unusual, but in our system of justice, the burden falls only on one side.

Where that burden would be shared by two, then that is not our system of law, and at this point, because of that disagreement, you'll be excused from further service as to this case.

However, you can return to the jurors' lounge. It may well be that you'll be assigned out on different case, okay?

PROSPECTIVE JUROR YORBA: Do I have to be on a case, though?

THE COURT: I don't know, ma'am. Check with the jurors' lounge.

Why don't you take this note with you?

PROSPECTIVE JUROR YORBA: Down --

THE COURT: Yes, down to the mezzanine.

PROSPECTIVE JUROR YORBA: Okay.

(prospective juror Yorba exits courtroom)

THE COURT: The record should reflect that this is an excusal by stipulation.

It would appear that Miss Yorba has a difficult time understanding the basic concepts of the criminal justice system, and certainly, in a case of this magnitude, would be improper as a juror.

Would counsel agree that that's the basis for the stipulation?

MR. WOODWARD: That's correct.

[25 RT 2509]

MS. FRANCO: Yes, your honor.

THE COURT: Hispanic female?

MR. SHEELA: Yes, sir.

THE COURT: We're off the record.

(Discussion off the record)

THE COURT: The next prospective juror, miss nelson, I'm going to start with question 4, and depending on the response to question 4, we'll proceed to the others.

Did counsel bring your questionnaires for the rest of the week?

MS. FRANCO: Yes, your honor.

THE COURT: Okay.

MS. FRANCO: Nelson is one whose favorite judge you are not.

THE COURT: True.

Why don't you pull out your questionnaires, and let's start with Tuesday, and get those out of the way.

As soon as she comes, Mike, we'll take her.

THE BAILIFF: Yes, sir.

THE COURT: Meszaros. Question 23, positive experiences.

Question 47, counseling.

57, problem with drugs.

Any additional questions?

MS. FRANCO: No, your honor.

MR. WOODWARD: No.

MR. SHEELA: No.

THE COURT: Casady. Number 11.

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[25 RT 2526]

[Karen Nelson]

Now, because the prosecution is seeking the death penalty in this case, we are forced to talk to you about your feelings with regard to the.death penalty at a stage when it's not even clear that you'll ever get there.

If you were to sit as a juror, you might find him not guilty, or you might find the special circumstances not to be true, and we wouldn't have to worry about your feelings about the death penalty, but because we can't stop midway into the trial to ask at that point what your feelings are, we have to ask now.

A Uh-huh (affirmative)

Q And what both sides in this case need to know is that the jurors that sit on this case can be fair and impartial to both sides.

From everything that you have told us so far, it would appear that you feel that you can be fair and impartial; is that true?

A Right.

Q Okay. Now, if we ever got to the penalty phase, and you were sitting as a juror, and you heard all the evidence, evidence presented by the prosecution, evidence presented by the defense, at the end of all of that, you'd get an instruction from the judge on how to handle that evidence, and the instruction would be this: If you find that the evidence in mitigation, the evidence presented to convince the jurors that the appropriate sentence is life without possibility of parole -- if you find that the evidence in mitigation substantially outweighs the evidence in

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San Diego County Superior Court
[Title Omitted in Printing]

[27 RT 2781]

Q Good morning, Mr. [Galileo] Somerville.

A Good morning.

Q Mr. Somerville, I don't think I need to tell you that your questionnaire was extremely interesting

A Oh, was it?

Q -- for us to read.

A I'm glad.

Q We've all had an opportunity to look at it, and the reason that you're here today is so that we can follow up --

A You still want me?

Q -- on some of the responses that you gave.

A Okay.

Q While you told us a lot about yourself, there are some areas in the questionnaire that aren't entirely clear as to your views.

A Okay.

Q And I'd like to follow up on some of those if I could.

A Of course.

Q Some of your responses seem to lead us in one direction, some in another.

A Kind of like a lawyer, huh? Yeah.

Q At this point I'm not quite sure what your feelings are, so I'm going to start with some of the areas that will lead up to the death penalty questions that I have, and hopefully it will shed some light on what your views are.

A Sure.

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[27 RT 2783]

D.A.'s office, do you think that you -- if you sat as a juror in this case, that you might tend to favor the

district attorney's office for having employed your wife or former wife?

A That would have no bearing on my -- no.

Q So you could be fair to both sides, at least in that regard?

A The word "fair" I have a problem with, but I would have no problem.

Q Let me go beyond -- let me see if I can get -- ask a better question that doesn't use that word.

A Okay.

Q If the district attorney's representatives, the prosecutors, called witnesses in this case, would you take the position that everything those witnesses said was true and unimpeachable because they were called by the prosecution or the district attorney's office?

A I would not feel that way.

Q Would you take the position that any witness that any witness that was called by the prosecution couldn't be believed and shouldn't be believed and you wouldn't listen to anything they had to say because the prosecutor called those witnesses?

A No. I don't think in extremes like that, far to tThe left, far to the right.

Q So you feel comfortable in listening that you could listen to the testimony and evaluate it yourself, having nothing to do with who called the witness?

A In respect to having nothing to do with who

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[27 RT 2786]

Q Have you heard anything about either this case or anything related to this case?

A Not to my knowledge.

Q Okay. Now, the response that caused me a little bit of concern was the question that asked you

whether you had any specific biases for or against either criminal defense lawyers, prosecutors or law enforcement officials; and the way that you answered the question -- I can show you that perhaps to refresh your recollection, but it sure looked like you were singling out criminal defense lawyers for -- for bias or special treatment, but maybe not.

A Well, they-- they have to put their own spin on the case. That's what I'm saying. No. They have their own interests.

Q The criminal--

A It's the system I have a problem with. No. I'm not talking about personalities or jobs. I just think the system is what we're stuck with.

Q All right. You said, "legal system, period," but let me just ask you this. Was it because the word "criminal defense lawyers" came first --

A No.

Q -- that you happened to put "yes" there?

A No.

Q But really you meant everybody, "I have a problem with the whole system"?

A I don't have a big problem with it. I just -- well, I read between the lines. I don't have a problem with

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[27 RT 2795]

that that is true?

A I believe I will from what I know right now.

Q Okay. There were a series of questions about -- well, it was a series of statements, and we asked you for your feelings with regard to those premises, burden of proof, beyond a reasonable doubt, a defendant being presumed to be innocent unless and until proven guilty, those kinds of

premises; and, you know, you sort of danced around those like a boxer, too.

A That's the only way to handle questions like that.

Q All right. So let me go through them one-by-one and make sure that you and I have the same understanding as to what you meant.

A Okay.

Q With regard to whether the form of prosecution was fair to both sides which required that the government through the district attorney prove the defendant guilty beyond a reasonable doubt you said, "the word fair is meaningless to me," and you've told us that again here today. However --

A I won't say it again, though.

Q Okay. Can you accept that that is the system --

A Oh, yes.

Q -- that we use, that we must operate by?

A I understand that.

Q And while if you were a senator in the congress you might write a different constitution, you might put

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San Diego County Superior Court
[Title Omitted in Printing]

[28 RT 2974]

San Diego, California, Thursday, 3-23-89, 1:30 p.m.

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(The following proceedings were held in open court out of the presence of the prospective jury:)

THE COURT: We're off the record.

(Discussion off the record)

THE COURT: Let the record reflect all parties are present.

Are we ready for Miss Slutsky?

MS. FRANCO: Yes, your honor.

MS. MICHAELS: Yes.

MR. SHEELA: I understand we cannot take it once the trial starts, we have to take it before the trial starts.

(prospective juror Slutsky enters courtroom)

Elizabeth Slutsky

Examination

By the Court:

Q Good afternoon, Miss Slutsky.

A Good afternoon.

Q How are you doing, ma'am?

A Fine.

Q Good. What I would like for you to do, as much as possible -- and I realize this is a different experience for you -- I want you to sit back and relax, okay?

A Uh-huh (affirmative).

Q while you were waiting, did you have an

[28 RT 2975]

opportunity to review the summary of legal issues and preliminary questions?

This was a packet of material in the jurors' lounge.

A No.

Q You didn't read it?

A Not today. I read the papers that they gave me in the office.

Q Today?

A Yeah.

Q Okay. That was the summary of legal issues and Preliminary questions?

A Yeah, yeah.

Q Did you also have an opportunity to look at the list of potential witnesses or names of people that might well be mentioned during the course of this trial?

A Yeah.

Q Did you recognize any of the names?

A Just one, but he wasn't what he was supposed to be on there, Fowler.

Q Fowler?

A Fowler; but I don't think it's the same one, because he's not a police officer.

Q Okay. What I would like to do, Miss Slutsky, is to go over those four questions that you've previously reviewed. I need to get your answers on my record.

A Yeah.

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[28 RT 2978]

fill out, there were a couple of things that you probably forgot to answer as you were going through it, and I wanted to ask you about those.

One of the was whether you feel you have any problem with hearing at all.

A No, no problem.

Q Okay. So anything that would go on the courtroom, you feel you'd be able to hear?

A Yeah.

Q And the other is whether you have ever had any friends or relatives, acquaintances, who have been employed by law enforcement in any way.

A I had a -- a brother-in-law, ex-brother-in-law.

Q Okay.

A But I didn't know him very much, and I didn't know what -- you know, if i should put it down or not, because we didn't live near them.

Q Okay. What was your ex-brother-in-law; a sheriff --

A Yeah.

Q -- or police --

A Sheriff up in Oxnard.

Q And did you see him with any kind of frequency, or not too much?

A No. We were not even in the state at the time.

Q Did you ever talk to him about his work?

A No.

Q And nowadays, you don't see him at all?

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San Diego County Superior Court
[Title Omitted in Printing]

[29 RT 3170]

private is done for a particular reason, and that is that it's not to be discussed with anyone --

PROSPECTIVE JUROR GONZALEZ: Fine.

THE COURT: -- family, friends, other prospective jurors. I can appreciate the fact that you're a history civics teacher and to the extent that you can discuss the jury process, certainly at least in terms of a capital case, without mentioning particulars, I hope it aids in educating the youth.

Have a good afternoon, sir.

PROSPECTIVE JUROR GONZALEZ: Thank you.

THE COURT: You'll receive your card. Return to the jurors' lounge. It may well be you'll be assigned out on a different case.

PROSPECTIVE JUROR GONZALEZ: Okay. (exits courtroom.)

THE COURT: Hispanic male.

MR. SHEELA: Yes, your honor.

MS. MICHAELS: Yes.

THE COURT: Counsel, if you would pass in your questionnaires.

MR. WOODWARD: That's a hundred percent this afternoon.

MS. MICHAELS: I wanted to find out what Bill Youmans said about prosecutors.

MS. FRANCO: The truth.

MS. MICHAELS: No. I called him and he lied to me. He said he didn't say anything.

MS. FRANCO: Gloria doesn't know when to stop typing.

THE COURT: Well -- we're off the record.

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San Diego County Superior Court
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[30 RT 3238]

Jurors. Okay?

PROSPECTIVE JUROR PADILLA: Okay. Yes, sir.

THE COURT: Have a good day, sir.

PROSPECTIVE JUROR PADILLA: Thank you. (exits courtroom.)

MR. SHEELA: He is a Hispanic male.

THE COURT: The record will so reflect.

Counsel, if you will turn in your questionnaires.

Do we have the questionnaires for Wednesday and Thursday.

MR. SHEELA: (nods head affirmatively.)

MS. MICHAELS: Yes.

THE COURT: I have Gloria here. I always like to go over them when she's here.

MS. MICHAELS: It's her favorite part. (laughter.)

THE COURT: Cobleigh.

17.

23, positive experiences.

33. And here I'm referring to the bottom with the cousin committing suicide.

47, the therapist.

57, problems with drug and/or alcohol.

And 67.

Anything additional?

MR. SHEELA: No, your honor.

THE COURT: Carpenter.

No. 11, if you desire to inquire.

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San Diego County Superior Court
[Title Omitted in Printing]

[31 RT 3363]

[Charles Cobleigh]
the information that you already gave us.

You did tell us that you have a friend who's a district attorney, and I think I ran into her on the elevator this morning and didn't realize you were the first person up today. Pat -- is Pat Davis --

A Pat Davis, yes. I haven't seen her for a number of years, but she's the only person I know, actually know, that's in law enforcement now.

Q Can I ask what the nature of your acquaintance is with her? Is it social or familial?

A She's the former wife of a very close friend of mine.

Q Okay. Okay. I think you did tell us that.

At the time that you had a -- more interaction with her, did you have occasion to discuss the nature of her work?

A Probably from time to time.

Q Okay. And anything about those conversation that you think may have caused you to be biased in -- in any -- towards -- within the criminal justice system towards one side or the other?

A Not that I can recall, because it's been long enough I probably don't remember any of the details or actually any of the general subject matter.

Q I -- for the most part, I'm sure that prosecutors are hard working people, and I suspect that Pat Davis probably conveyed that to you; and were you to sit as a juror in this case I'm sure that you would see the prosecutors here working

[31 RT 3364]

extremely hard to convince the jury of either the guilt of the defendant or the truth of the special circumstances or that they should bring back a

verdict of death. And, you know, what we would like to be sure of is that when you see them you weren't in your mind picturing Pat or somebody like her and giving them some extra advantage in this case that you don't give to the other side just because of that knowledge or acquaintance.

A Well, I'm not going to give anybody any special breaks one way or another, because you're-- all have your jobs to do.

Q Okay. You told us that at one time or – I presume that it was you, that at one -- someone at one time had a desire -- yes, had a desire to be work in law enforcement, applied but, quote, "didn't catch on"?

A Yeah. I applied for -- let's see. Well, it was a San Diego County Sheriff, Marshal, whatever they -- civil service routine is, went through the examination procedure; and out of the 800 or a thousand or something like that that qualified, I was down in the middle for about 20 positions they anticipated. And I believe this was 19 -- probably right around the end of 1971 or during 1971, and just thinking that it was an improvement over what I was doing at the time.

Q Okay. Looked like a good job?

A Well --

Q Had some benefits?

A Looked like it would provide some interesting work, I guess.

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[31 RT 3365]

Q Anything about that experience or desire that you've had in the past that causes you to be biased in any way toward one side or the other?

A No, not really. I mean, I'm not-- I'm not disappointed and feel that I've got to go out and do something to overcome that, and nor am I

disappointed that -- and want to get back at law enforcement or whatever.

Q Okay. If police officers were to testify in this case, you could listen to their testimony, evaluate it in the same way that you would any other witness, and decide what weight to give it, if any?

A Yeah.

Q Okay. You also told us that at one time you saw some shoplifters at Grossmont Center, and I'm wondering whether aside from witnessing the incident, whether you had to talk to the police or go to court or do any of those things?

A No. I talked to store security person, but I really didn't have enough information to-- to help them. That is to say, I didn't realize what was happening until it happened and wasn't able to note the license plate, so it was really kind of a moot point.

Q Okay. Also, that's -- in 1979 and also 1983 you were the victim of thefts, and I'm wondering whether that experience has affected you in any way that would create a bias that you couldn't set aside if you were to sit as a juror in this case.

A It irritated me at the time, but obviously it

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[31 RT 3366]

doesn't-- hasn't really given me any biases one way or another.

Q Okay. Sometimes people say, you know, "I didn't really have any strong feelings about enforcing the criminal justice system to -- to the max until this happened to me, and now I feel real strongly about that," and while you didn't like losing your property, you think that you could be fair if you were to sit as a juror?

A Yeah. Well, certainly.

Q Nobody was ever arrested as a result of that? You didn't have to go to court or anything?

A No.

Q Okay. And in light of the fact that you've had both positive and negative experiences with law enforcement, I take it that simply reinforces what you told me a little while ago, that they are people like anybody else?

A Well, you -- don't change your -- your stripes as it were, when you put on a badge; and you have to judge everybody's testimony in a court case on its face.

Q You read the paper daily or get the paper and I guess try and read it daily?

A Yeah.

Q And you told us that you watch the television news sometimes and get news on the radio occasionally in the morning, as well, and I -- I know that you told us that prior to coming here you did recall having some knowledge of this case or having heard of the case?

A Yeah. That's about it.

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[31 RT 3384]

Is that true?

A That's true. Of course.

Q Okay. And your views, as far as you've expressed so far, is that you find that there would be circumstances, certain types of crimes or events that you would hear where you feel that the death penalty would be appropriate?

A Yes. That's correct.

Q Okay. Have you taken either -- through the questioning of counsel here today or through your own analysis of the appropriateness of that penalty, have you taken yourself right into the thick of things, so to speak, away from the impersonal, "yes, it's a

good idea," approach to the, "yes, it's something that I can personally be responsible for delivering in an appropriate case," that is, the penalty of death?

A Yes. I have really seriously considered that because it's a pretty heavy responsibility, and it's something that you can't honestly take lightly if you're thrust with the responsibility of making that decision. Yes, I've considered that.

Q Okay. And having considered it-- perhaps if I could just place you in that position for a moment.

I'd like you to assume, first, that you had heard all the evidence in the first part of the trial and you had concluded after hearing the evidence and according to the law that the defendant was guilty of first degree murder and that at least one special circumstance was true; further, that now all the evidence, whatever that might be, has been

[31 RT 3385]

presented to you in the penalty phase. You've done the weighing and the balancing process, and you have concluded that not only do the circumstances in aggravation substantially outweigh the circumstances in mitigation, but for you, you feel that this is that kind of a case, whatever that kind of a case may be for you, in which the death penalty is appropriate.

Having made that mental conclusion, let's assume now that all of the other jurors that you are with have voted according to their analysis, and their vote is for death; and yours is the last vote to be cast and you recognize that the vote of death, the verdict of death, could not be reached unless you personally make that vote yourself, because the verdict would have to be unanimous. So literally you would have the defendant's life in your hands.

In that situation, feeling that -- that the death penalty is appropriate, mentally, intellectually, to

you, would you have any reluctance or hesitation in returning the verdict of death?

A I would say probably not. If -- if it came to the -- that point under those conditions that I felt strongly that that was the appropriate penalty, then I say with a very high likelihood that I would do that. I mean, I cannot honestly predict. I'm not a crystal ball person --

Q Certainly.

A --and I've never been placed in this situation, but I feel that in a very rational way that I could cast that vote.

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[31 RT 3436]

PROSPECTIVE JUROR GEROW: Thank you.

MR. SHEELA: Thank you.

(Prospective juror Gerow exits courtroom)

THE COURT: White male?

MR. SHEELA: Yes, your honor.

THE COURT: Miss Sehlhorst, Hispanic female?

MR. SHEELA: Yes, your honor.

No. Excuse me. Portuguese.

THE COURT: Well, she says "Mexican," and I'll accept her representation.

MS. MICHAELS: No. The one before her said Portuguese.

MR. SHEELA: I'm sorry. You're right.

THE COURT: I have the questionnaire. She says "Hispanic female."

MR. SHEELA: Miss Carpenter was Portuguese.

MR. WOODWARD: Are you talking about the gal that is pregnant?

Hispanic? Nonsense. She was a blonde.

MS. MICHAELS: Hey.

MR. WOODWARD: She was a natural blonde.

THE COURT: Yeah, so much --
MS. FRANCO: Some stereotypical notion.
THE COURT: This is off the record, Susanne.
(Discussion off the record)
THE COURT: Mr. Wirth?
THE BAILIFF: No, sir.
MR. SHEELA: I thought it was Mr. Yu.
This is yours.
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San Diego County Superior Court
[Title Omitted in Printing]

[33 RT 3626]

with a pre-set mind, that you would vote for the death penalty no matter what you heard in mitigation, no matter what other evidence was presented, you would just shut down to that other evidence in the penalty phase?

A It's quite possible I might do that

Q Okay. I've got to -- I need to get a more concrete answer from you, if I can.

A That's the best I can do.

Q Is that the best you can do?

A Right.

MS. MICHAELS: I understand, not being in that position, it's very hard to speculate as to what you may think before you're actually there.

Thank you, Mr. Eby.

I have no additional questions, your honor.

THE COURT: Mr. Eby, if you would step outside of the courtroom; await further direction from the court, please.

PROSPECTIVE JUROR EBY: Thank you.

(Prospective juror Eby exits courtroom)

THE COURT: Counsel?

MR. SHEELA: Your honor, we would challenge Mr. Eby on the basis of Witt, that he's impaired, and if there's serious debate about it, I have quotations that I can cite to The Court at this time.

THE COURT: Let's see if it's seriously debated, sir. Miss Michaels?

MS. MICHAELS: submit it, your honor.

THE COURT: Okay. As to Mr. Eby, the challenge will be

[33 RT 3627]

granted. He's substantially impaired from performing his function as a juror, because of his firm beliefs

that if you commit first degree murder, then the only proper penalty is death.

The challenge per Witt will be granted by the court.

If counsel would turn in your questionnaires.

He's an African-American male.

MS. MICHAELS: Yes.

MR. SHEELA: Yes.

(Prospective juror Eby enters courtroom)

THE COURT: Mr. Eby, let me indicate a couple of things to you, sir.

Our purpose this morning is not to question your beliefs; only to assess them.

As indicated by counsel, we have to have jurors that if, in fact, we do get to the penalty, have to be open to honestly evaluate the evidence.

I thank you for your candor, and your difficulty in doing that renders you an improper juror for this particular case.

You will be excused from further service as to this case.

However, you'll receive your card.

Report back to the jurors' lounge. It may well be that you'll be assigned out on a different case.

A continuing order, sir. What we've

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San Diego County Superior Court
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[34 RT 3816]

[Barbara Santos]

MS. FRANCO: No. I don't have to do that. Just one moment.

(Discussion off the record)

MS. FRANCO: I'm through, Mrs. Santos. Thank you very much.

PROSPECTIVE JUROR SANTOS: Okay.

THE COURT: Mr. Woodward.

MR. WOODWARD: Thank you, your honor.

Examination

By Mr. Woodward:

Q Good morning, Mrs. Santos.

A Good morning.

Q Have you been worried about coming into court and facing all of us this morning?

A Yes.

Q Well, you had several months, I guess, to be thinking about this day, after you filled out the questionnaire.

A Yes.

Q Did it bother you to be worried about coming into court and talking about these things?

A I just never been to court before, and --

Q Well, just relax. All we're trying to do, as counsel has already said, is to see if this is the case for you as a juror.

You were -- in filling out the questionnaire, there were some things about you that you told

[34 RT 3817]

us, and we want to ask a few of those questions -- excuse me -- because some of the evidence in this case might have some relationship with your own background.

For example, alcohol. You probably noticed that there were several questions about alcohol.

A Yes.

Q Have you had some bad experiences in your family with alcohol?

A No, not bad experiences, no.

Q Nothing in your background with anybody in your family, or your husband, or anybody else?

A Well, they drink, but no bad experiences.

Q Okay. Have you had any -- do you know anybody, for example, who has had an alcohol problem?

A An alcohol problem?

Q Yes.

A You mean, that drinks?

Q Yes, and perhaps drinks too much, that creates a job problem, work problems, whatever the case may be.

A No work problems or anything. It is just an opinion that if I think someone drinks too much, that's -- but it's not a problem.

Q Okay. I take it, then, that if you heard testimony from witnesses who came into court and you learned that they used alcohol and maybe used too much of it, that that's not something that would cause you to automatically reject --

A No.

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[34 RT 3819]

A No, no.

Q You would not have any feelings one way or the other about the use of heroin, if you were to hear about that in court?

A I would listen to the testimony, yes.

Q Okay; and you could listen to and evaluate testimony regarding heroin?

A Yes.

Q Okay. We asked you a series of questions, if I can -- I wonder if I can just show you one answer that you put down on the questionnaire regarding alcohol, because it might help you in -- in seeing what it was that you said.

In question number 57, there was a question, "Have you or anyone you know had a problem with drugs or alcohol?"

A Uh-huh (affirmative).

Q And checked no, and then it looks like you crossed it out and you said yes. Then you wrote, "an alcohol husband."

Could you help me? What did you mean to say to us there?

A I would like him to stop drinking beer. He loves beer, and he's always drinking it, and I don't think he should be drinking it.

Q Okay. That hasn't-- other than the fact that he should not be drinking the beer and you want him to stop and say --

A No, I don't say anything.

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[34 RT 3822]

going to be asking for the death penalty.

A Yes.

Q You've had a couple of months now to be thinking about actually being a juror in that kind of a case.

A Yes.

Q I'm kind of seeing, from the-- from the— from what you've told us, that it's a sort of thing that you would really like to avoid.

Is that-- is that right, or am I misreading your answer?

A Yes, I think so.

Q I am misreading the answer?

A No, no. I'd really not-- prefer not to have to make the choice.

If I have to make the choice, then I feel I will.

Q Okay. As far as the answers about -- in the questionnaire --

A Uh-huh (affirmative).

Q -- there was a question as to whether or not you were part of any sort of a group or a religious body or organization --

A Uh-huh (affirmative).

Q -- which essentially prohibits or is against the death penalty, and you checked yes, and you said, "I'm Catholic," and then I could not quite read your writing because the Xerox was not very good, "I can't always agree."

I wonder if you can help me with that.

[34 RT 3823]

It's the number 68 right there.

A Yes.

Q Could you help with what you were saying to us there?

A Just because of the birth control, that's all.

Q Birth control?

A That I don't always agree with that.

Q Okay. So as far as your religion is concerned, you don't believe that there's anything in terms of your strong beliefs that would -- well, how would your religion, if at all, have any effect upon your duty as a juror to vote according to the evidence?

A No, I -- I couldn't let that be a part of it. It would have to be separate.

Q Okay. So you're saying that you could render a verdict in this case according to what you heard, and not according to any organization that you belong to?

A No.

Q Is that --

A That's true.

Q Okay. Now, you were then asked the question, "What are your feelings about the death penalty?"

A Uh-huh (affirmative).

Q And if I'm reading it correctly, it says, "if the crime is such."

A Uh-huh (affirmative).

Q This was page 15 of a whole lot of pages, and I have a feeling you're not the only one that was getting very

[34 RT 3824]

tired of writing at that point.

Can you help me now with telling us what are your feelings about the death penalty?

A That if -- if the testimony substantiates it, then I would have to vote for it.

If not, then I would not.

Q Okay. Now, let's suppose that you're listening to testimony as a juror, and let's further suppose that -- Well, let me ask you this: if you were a juror on this case, knowing that there are --that there's a possibility that there are two different trials that we're really talking about, trial number one is the one on top, and that's the question of whether the defendant is guilty of the charges or not guilty, and that's the only question for you to decide, and then if you say-- essentially, I'm going to cut through a lot of technical stuff here, but if you say yes to the first part, with some of the other technical answers that you're asked, then we're down to trial number two, and that's the trial in which you're going to be asked the question at the end of it, "does the defendant live, or die?"

Do you have any feeling now that you would like to avoid that trial number two, "the penalty phase" we call it?

A Not by -- not by just overlooking what I had heard on the beginning, no.

Q Okay. Is your answer --well, would you rather not get to the second part of this trial, if you were a juror?

A If the first part weren't the second part, then I

[34 RT 3825]

would – I would feel that I would have to, yes (sic).

Q I'm sorry. I didn't quite follow what you were saying, and I don't mean to-- it may just be that I'm missing a couple of the words.

A Let's see. Would I -- what did you say?

Q Would you rather not --

A Go on the second part?

Q If you were a juror and you're doing the things you're supposed to be doing as a juror, would you prefer not to get to the penalty phase of the trial?

MS. FRANCO: Object as asked and answered.

THE COURT: Sustained.

MR. WOODWARD: As answered, your honor?

THE COURT: As answered.

By Mr. Woodward:

Q What I'm trying to find out-- maybe I can approach this a little different way.

You have two children that are grown --

A Yes.

Q -- and so forth, and I take it that they are not living at home now.

When they were younger, were they involved in sports such as baseball?

A No.

Q Can you imagine -- or maybe you know of other parents that during your children's younger years were involved in, say, baseball?

A Yes.

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San Diego County Superior Court
[Title Omitted in Printing]

[35 RT 3894]

automatic, the challenge per Witt and Witherspoon will likewise be granted.

(Prospective juror Gonzalez enters courtroom)

THE COURT: Mr. Gonzalez, let me echo what the attorneys have said to you. The reason our system of justice is so good is because of people like yourself that can be honest with us.

No one is here to question your beliefs; only to determine what your beliefs are.

You've been very honest with the parties. You've indicated that because you're a victim, that might well affect how you would view the evidence in this case.

Because of that, as well as the fact that you believe death to be the appropriate penalty always, you would not be an appropriate juror for this particular case. However, it may well be that on some other unrelated case, you would be.

At this time, I want you to get your card. Return to the jurors' lounge, and you may be assigned out to a different case.

One order that I want you to remember.

What we've discussed in this courtroom is to remain here. You can't discuss it with anyone else; your family, friends, other prospective jurors, while this case is pending.

PROSPECTIVE JUROR GONZALEZ: Yes.

THE COURT: Have a good day, sir.

PROSPECTIVE JUROR GONZALEZ: Thank you very much.

[35 RT 3895]

(Prospective juror Gonzalez exits courtroom)

THE COURT: Male Filipino.

MR. SHEELA: Yes, sir.

MS. FRANCO: Yes, sir.

THE COURT: Did you desire to be heard as to the leading questions?

MR. SHEELA: Well, only to the extent, your honor, that -- that the court has sustained a prosecution objection to a leading question not this week, but about two weeks ago, and whether you sustain them or overrule them, I just – we have a -- I know we're a little family in here, but this man was coming in here, we had the decorum, and everybody breaks up because the defense makes an objection.

I thought -- I understand the prosecution, they are advocates, they can laugh, but I thought it was inappropriate for you to laugh.

THE COURT: I thought the objection was inappropriate, and it was funny at the time, Mr. Sheela.

If, in fact, you find that in the transcript, and that was the basis for me sustaining the objection, I'd like to see it.

MS. FRANCO: You did, and we will.

THE COURT: Was that the sole reason?

MS. FRANCO: Absolutely. The court sustained a leading objection, and I was stunned, because we had been allowed to lead up until that point.

MR. SHEELA: And we've been leading since.

THE COURT: To say the least.

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[35 RT 3978]

her concern is so great that it would impact how she would view the evidence in the first phase of the trial.

Miss Devin is substantially impaired, and The Court so finds.

The people's challenge, based on Witt, not Witherspoon, will be granted.

(prospective juror Devin enters courtroom)

THE COURT: Mrs. Devin, let me echo the sentiment of both counsel. The court appreciates your candor. It's because of that, that our system of justice works so efficiently.

Because of the fact that it would be very difficult, in point of fact, might even affect how you would perform during the first phase of this particular trial, you will not be eligible to serve on this particular case.

However, I have absolutely no doubt but that you would be an excellent juror on a non-death penalty case, so when you receive your card, report back to the jurors' lounge for possible other assignment.

One order that I want you to remember, and this continues until this case is resolved, what we've discussed here in court is not to be discussed with anyone; family, friends, other prospective jurors, okay?

PROSPECTIVE JUROR DEVIN: Yes.

THE COURT: Have a good afternoon, ma'am.

(prospective juror Devin exits courtroom)

THE COURT: Female pacific islander.

MR. SHEELA: Yes.

[35 RT 3979]

THE COURT: We have the questionnaires?

MS. MICHAELS: Yes.

THE COURT: We're off the record.

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San Diego County Superior Court
[Title Omitted in Printing]

[43 RT 5003]

[Douglas Streed]

A No, sir.

THE COURT: Mr. Sheela

Examination

By Mr. Sheela:

Q Good morning, Mr. Streed.

A Good morning.

Q I have the opportunity to follow up on some of the judge's questions to you this morning, and also to follow up on some of the information that you gave us in the questionnaire.

A Can I add something to that?

Q Sure.

A It wasn't -- one of the questions on there was asking about affiliations of mine, and the NRA in particular, and I believe my answer was -- and I -- at the time, I just was answering, I said, "Yes, I am a member of the NRA." I mean also --and I didn't mean to-- to omit it, it just didn't cross my mind-- I'm also a member of the California Rifle and Pistol Association, and I just wanted -- I was sorry I hadn't thrown that in at the time.

It was just an omission on my part.

Q It's just that after you left, you thought about the questions that you'd been asked, and that one popped into your head?

A Actually, I got home, and there was an envelope from them on my desk, and I said, "I didn't tell them I was a member of that."

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[43 RT 5008]

great result, but it's pretty happenstance --

A Yeah.

Q We asked the question to determine if policemen were to testify here, is there anything that's happened in a person's past that would give them such strong feelings about the police, or such strong negative feelings about the police, that it would keep them from being fair to a policeman as a witness.

I take it here the answer would be no?

A No.

Q Okay. Let me ask the death penalty questions, because that's the other reason that we've got you back here.

One is the biographical, the other is the death penalty.

We asked you your feelings about the death penalty, and you said, "I feel in some cases, the death penalty is the correct solution."

I wonder if I could get you to expand on that.

A Well, if a person has -- you know, I am not a big reader of what constitutes this person to get the death penalty, or this person not, but the Harris. Case, which goes back, which was -- there was something on TV where they asked him something.

I believe he's on death row. I'm not sure, but I believe he is, and I can't even recall the exact crimes, but I remember them to be quite bizarre, and -- and here he was, facing execution, and I don't know.

[43 RT 5009]

At the time, you know, if the other is life without possibility of parole, I think -- I think you have to have -- and I firmly believe that the -- that justice should be commensurate to the offense, and if -- if --if --if there is this imaginary line -- and I couldn't define it for you, you know -- you would lose sleep over it.

It would be the biggest decision. At least, it would be the biggest decision I've ever made in my

life if I had to come up with a death penalty, but if it fit the special circumstances, if that's the case, if it was clearly there, I would have to say the death penalty is -- is our only choice, my only choice.

Q Let me use the chart for a second, and talk about that, because I want to make sure I'm real clear, we're real clear about it.

In a criminal case -- this is a criminal case just like any other one the jurors are impaneled to hear the evidence to decide whether he's guilty or not, has the prosecution proven its case beyond a reasonable doubt? That's the same way here.

If the jurors return a verdict of not guilty, the trial is over.

If they return a guilty verdict of any crime other than first degree murder, the trial is over for the jurors, the judge does the sentencing, and that's a normal criminal case.

A Okay.

Q If and only if the jurors make a finding of guilt

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[43 RT 5025]

Q That's what I'm really trying to get at.

Some people have gone to a psychiatrist and they didn't help at all, and they said, "boy, that field is a bunch of bunk. I'll never believe anybody that is a psychiatrist," and some have the reverse experience.

That has not happened to you?

A No.

Q Okay. As far as the death penalty is concerned, I think you've indicated that very clearly, most of your views in that area -- one of the last things that you said was that quite clearly, a final decision which was life without the possibility of parole would be a much more comfortable position--

A Yes.

Q --or vote for you to make than the -- than the vote for death.

A Right.

Q Do you feel that perhaps that would be true of anybody that was sitting on a jury?

Do you feel that recognizing now that a decision by you with regard to the death penalty might be coming up, that there would be any tendency that you would have to be worried about that, getting to that portion of the trial, the penalty phase, even up in the first part of the trial, the guilt part of the trial?

A No. I don't think "worry" is the right word. I mean, it's -- it is like any other decision that might be coming up in your life. You have a tough decision ahead, you

[43 RT 5026]

approach it, and when the time is there, you make it.

I wouldn't shy from it.

Q Okay. You'll be given an instruction during the first part of the trial, this trial or any trial, that your decision about the truth of the charges, whether the defendant is guilty or not of them, has to' be made based only upon the evidence, and not out of any concern for what the prospective punishment might be, and since we're talking about the death penalty, sometimes it may be difficult for people to do that.

A I don't perceive a problem in that.

In any decision-making I've been in -- my business puts me in decisions where we try to stay away from death.

I was also in the military, a fighter pilot, and if I was going into an engagement, I wouldn't be concerned for myself or the adversary. I would be trying to do the best I could in what I'm doing.

Q That's a good analogy to perhaps your function during the first part of the trial.

The burden of proof standard that counsel talked to you about during the penalty phase, where any additional evidence, if there were to be any, that the prosecution would present in that portion of the trial, before you could consider it, you'd have to decide that it was true beyond a reasonable doubt --

A Yes.

Q -- you've indicated that you could follow that instruction, and do that?

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San Diego County Superior Court
[Title Omitted in Printing]

[44 RT 5179]

[Dorothy Cook]

A (Prospective juror nods affirmatively),

Q Then in the second phase, if there's additional evidence presented, the prosecution is entitled to present some evidence that's not relating to the crime. It would be relating to the background of the accused generally, and that evidence we call "evidence in aggravation,"

The defense can present in the second phase of the trial what would be called "evidence in mitigation," and that again is dealing with the accused, mostly.

A (Nods affirmatively),

Q "Evidence in aggravation" we define as evidence that is designed to convince the jurors to vote for the penalty of death in this second phase.

A Uh-huh (affirmative),

Q "Mitigating evidence" is evidence designed to get the jurors to vote for the penalty of life without possibility of parole, because in this second phase of trial, the jurors' job is to weigh and consider the

evidence in aggravation and mitigation, and decide which of the two penalties shall be imposed, so as in the trials you've sat on, the judge told you that in those trials, that you were the judges of the facts, and the job of sentencing was up to the judge, and you were not to concern yourself with that.

That's in the first phase of this trial. You're the judges of the facts.

If we get to the second phase of the trial, you become not only the judge of the facts, but the judge of the sentencing.

[44 RT 5180]

You decide the sentence, okay?

A Uh-huh (affirmative),

Q Now, there was just an intake of breath there.

Now, if you didn't understand before, you understand the enormity of what -- what can happen in a capital case.

No one is saying that we're ever going to get past the first step, guilt or not guilt --

A Uh-huh (affirmative),

Q -- but now is the only time we have to talk with jurors to decide whether jurors can sit not only at the beginning of the trial, but if it ever happens, we have to have jurors that can do the job all the way down to the bottom of the chart, and that there's nothing in that juror's background or attitudes about the death penalty or anything that would keep them from being fair, even if we got to phase two, and so that's -- I wanted to make sure you understood that, and let me ask you some more death penalty questions, as long as we're. In that area.

A Uh-huh (affirmative).

Q We asked you about your feelings on the death penalty, and you told us that you believe in the death penalty.

A Yes.

Q I'm wondering if I can get you to tell me some more about your feelings about the death penalty.

A Well, I don't know. It just seems like the prisons aren't doing the job or something, because there's

[44 RT 5181]

more crime than ever, or it seems to me, and I've never had to vote on a death penalty.

That might be a little bit difficult when it came right down to it, but I say I'm for it.

Q I want to talk about that as well in just a second, about what a personal responsibility it is --

A Okay.

Q -- to have to sit on a jury of this kind.

We asked you in the questionnaire if your feelings on the death penalty had changed in the last ten years, and you told us yes, they had, that you feel there's more serious crimes now, but not very many criminals receive the death penalty, and then we asked you-- again, the next question was, "Do you think the death penalty is used too often or too seldom?" what you said was, "too seldom. When a person has been found guilty, the judge seldom hands down a death sentence," and I think now you know that it's not the judge, it's the jurors that do the job?

A Yes, uh-huh (affirmative). Uh-huh (affirmative).

Q Okay. Another question we asked in the questionnaire is, "do you think there's any" -- do you have a personal feeling that there's any types of crimes, types of crimes for which a person, if he's convicted of those crimes, found guilty beyond a reasonable doubt, he should always receive the death penalty, and in the questionnaire, you told us no.

A I think maybe there are circumstances.

You know, I would have to know the whole

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[44 RT 5190]

bring in a verdict.

Q And that was even after hearing all the evidence?

A Yes.

Q Now, obviously, you might perceive that this is not a tiny little case.

A No.

Q And I'm wondering if the cases that you did-- one of them you indicated was a -- was a drunk driving case?

A Yes.

Q The other one was a shoplifting case?

A That ' s right.

Q Did you have the -- the experiences of sleepless nights or worry about your function on both of those cases?

A No. I think just the first one, which was the shoplifting charge, because I had never done it before.

Q The sense of responsibility over somebody else's fate I guess is something

A Uh-huh (affirmative).

Q --that would weigh heavily on people.

A It was bad, yes.

Q Have you been thinking about how this case would affect you?

Let's just talk about the guilt or innocence phase. Forget the punishment part. We're talking about presenting evidence to you regarding the charges of murder--

A Uh-huh (affirmative)

Q --and clearly, you can perceive that under those

[44 RT 5191]

circumstances, you can be expecting to hear evidence. The case will be going on for quite some time, several months of testimony.

How would that affect you , do you think?

A I think I would worry a lot.

Q Throughout the entire trial, or during the beginning of it, or what is there about the worry?

What sort of a worry do you think that you would have?

A I just worry that I'm maybe not doing the right thing, you know

I want to be fair, but -- I want to be just , and it just it worries me.

That's a lot of responsibility.

Q It is.

A Uh-huh (affirmative).

Q Do you feel that -- obviously in those cases, you were asked to evaluate the testimony of witnesses, of people.

Did you find that part of your function on those previous cases was to decide whether somebody was telling you the truth or not?

A I believe that had a lot to do with it.

Q And were you able to make a decision?

A Yes, I was.

Q In this case, knowing the -- the gravity of the charges , if you will, do you think it would be harder for you to make a decision about any witness as to whether that witness is telling you the truth?

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[44 RT 5197]

defendant lives or dies, and to make this as realistic as I can, the court will also instruct you that whatever decision you make, you are to assume is the real decision.

In other words, we're not talking about an abstract, okay? "Mr. Ayala has a death penalty, but that's not really going to happen."

Your decision is what really will happen. In other words, the defendant would be executed, and likewise, the other punishment, life without the possibility of parole, means exactly that. The defendant would not be released from prison at any time, so either -- either decision that you make, you should assume, you must assume, is an actual decision with regard to the life or the death of a defendant.

Now, do you think that you're the sort of person -- other than the abstract, somebody who says, "yes, I approve of the death penalty, it's a good idea, I think that juries should return the verdict of death in some cases" -- but you're here. You're that person now --

A Uh-huh (affirmative).

Q -- and without your vote for death, the defendant could not be executed, because the jury would have to be unanimous.

Are you the sort of person who is capable of rendering that verdict, if the evidence supported it, and if you felt that was the fair and just verdict?

A I think I could.

Q Do you think you could?

A I think I could vote that way if I thought it was

[44 RT 5198]

necessary.

Q All right.

MR. WOODWARD: Thank you, your honor.

I have no further questions.

THE COURT: Mrs. Cook, if you would step outside the courtroom; await further direction from the court, please.

PROSPECTIVE JUROR COOK: OKAY. (Prospective juror Cook exits courtroom).

THE COURT: Counsel?

MR. SHEELA: Pass for cause.

MR. WOODWARD: People pass.

THE COURT: Would you have Mrs. Cook step in, please?

(Prospective juror Cook enters courtroom)

THE COURT: Mrs. Cook, you're going to be handed a piece of paper that tells you when to report back for the group questioning.

Until that time, I want you to just continue your normal routines.

A couple of things I would remind you of, ma'am. What we've discussed here in this courtroom today is to remain here. It's not to be discussed with family, friends, or other prospective jurors, okay?

PROSPECTIVE JUROR COOK: Okay.

THE COURT: Of course there's the ongoing Court Order: if you see or hear anything that even remotely reminds you of this case, completely disregard and ignore it, okay?

Have a good day, ma'am.

PROSPECTIVE JUROR COOK: Thank you.

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San Diego County Superior Court
[Title Omitted in Printing]

[45 RT 5383]

[Dorothy Hagan]

chart as the guilt or innocence phase of the trial.

In the guilt phase of the trial, would it be difficult for you to return a verdict of guilty of either the charges or the special circumstances, no matter what evidence you heard, just to avoid a decision on the death penalty?

A No.

Q In the guilt phase of the trial, would you always vote guilty or find a special circumstance to be true, no matter what evidence you heard, just so you could reach the penalty phase and have the death penalty available to you as a verdict?

A No.

THE COURT: Mr. Sheela.

MR. SHEELA: Thank you.

Examination

By Mr. Sheela:

Q Good afternoon, Miss Hagen.

A Hi.

Q I'm going to be asking you some questions to follow up on the judge's questions this afternoon about the death penalty, but also to follow up on the information you gave us in the questionnaire.

A Uh-huh.

Q And let me go to the questionnaire first.

You told us that -- we asked everyone a question about contacts with law enforcement, that is, family

[45 RT 5384]

and friends working for law enforcement, and you told us about two uncles of yours that worked for customs. I'm wondering, how long ago was that?

A The only uncle now surviving is 78 years old, so he has been retired for some time.

Q Is there anything about that contact that you had with the uncles doing law enforcement work that would make you have a tendency to either automatically believe or automatically disbelieve a law enforcement officer if they testified in this case?

A No.

Q You -- your car was stolen on one occasion and you actually told us you testified as a witness at the trial of the case?

A Yes.

Q Can I have you tell me a little bit more about that incident, how long ago it has and the circumstances of it?

A Oh, it's over 10 years ago; and I parked a car in a parking lot downtown, and when I returned it had been driven away just a short time before. It was one of the -- you leave the keys in the car lot at the time.

Q Did you see the car being driven away?

A No. So I didn't have very much to say, actually, but I did appear.

Q And at the trial -- was it a jury trial?

A No. No. The judge was -- I don't know the terminology.

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[45 RT 5390]

that decides the penalty, not the judge.

And so in other criminal cases the jury can go, "look, I'm just going to call the facts as I see them. It's not my job to decide the case-- what should happen to this person." in a capital case if you find the accused guilty of murder hi the first degree: and find the special circumstances to be true, that is your job.

Do you understand that from the materials today?

A Yes.

Q And that's the reason for the questions on the death penalty, is -- no one is saying that you're ever going to get there, but we need to ask the questions now to find cut whether people's attitudes on the death penalty-- whether a prospective juror's attitude is so strong that it would interfere with them being able to be absolutely fair to both sides.

We asked the question, "what are your feelings about the death penalty?" and you said, "I feel it is

correct in some cases," and I wanted to get you to expand on that if I could.

A Well, I suppose in an ideal world it wouldn't be necessary; but I feel that it is a deterrent, and in the world as it -- as it is, I think it has a useful function.

Q We asked also a question, "do you have any personal feelings about any types of crimes, any specific types of crimes for which you feel the death penalty should always be imposed?" and you said, "yes," and I wondered if I

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[45 RT 5396]

for the penalty of life in prison without possibility of parole even though the juror-- the person that they're voting on is a convicted first degree murderer with special circumstances.

If that's the instruction that the court were to give you at the end, could you follow that instruction in rendering your verdict?

A Yes.

MR. SHEELA: Thank you, Mrs. Hagen.

THE COURT: Miss Michaels.

MS. MICHAELS: Thank you, your honor.

Examination

By Ms. Michaels:

Q Hi, Mrs. Hagen.

A Hi.

Q Just a few more questions, ma'am.

Concerning the death penalty, as you now know this is a case wherein if the case goes through to the end the prosecution will be asking the jury to impose the death penalty on this particular defendant. Do you see any problems that you may have, or foresee any problems in personally imposing that kind of penalty if you feel it's appropriate after

hearing all the evidence and hearing about the law that applies to the evidence in this case?

A I don't think it would be an easy thing for anyone, but I don't-- I think I could do it if I felt it was the thing to do.

[45 RT 5397]

Q All right. And certainly we do not expect it could be easy. My only question is: if you felt it was right and appropriate, would you have any hesitation in returning to this courtroom and announcing that your verdict is one of death?

A No.

Q Okay. You said something a few moments ago that I would like you to expand on, and that was that you would have difficulty in relying on the testimony of one witness. Do you recall that?

A Uh-huh.

Q Talk to me about that a bit.

A I meant exclusively. I'm just being overly verbal, I suppose.

Q Oh, no. That's--

A Because that's the way the question was put, was that I was relying exclusively, and I took that very literally; and in fact you can't there's so much else happening, you couldn't possibly rely exclusively on one witness.

Q Let's assume for a moment that hypothetically the case was based primarily almost exclusively on the testimony of one witness. Now, there are some people who feel that the testimony of one witness, no matter how believable and no matter how much I believe him, would never be enough to convince me to convict in a criminal case, especially one as serious as murder. In other words, even if I believed him beyond a reasonable doubt I would still need to hear testimony

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San Diego County Superior Court
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[49 RT 5841]

procedure, I want counsel to utilize just the standard procedures.

If there's a for-cause challenge, then don't do that in front of the jurors. Let's go to side-bar.

If the for-cause challenge arises during the course of defense voir dire, just indicate your pass with reservation. Hopefully, it will be obvious to the parties.

I'll allow the people an opportunity to rehabilitate, and if the challenge persists, then you can still indicate that there's a reservation, and we can deal with it at side-bar.

If the people develop a challenge for cause, then indicate you pass with reservation. I'll give the defense an opportunity to rehabilitate, if it's that obvious.

If not, we'll come to side-bar and deal with it at that time.

When you make your challenge, give me your seat number, indicating "juror number 7," then the name, so that I can locate the person quickly.

Basically what I intend to do is to introduce the parties again to the prospective jurors. I'm going to indicate that each side, because it is a capital case, has twenty -- up to twenty peremptory challenges, and that spiel.

After that, I intend to turn the voir dire completely over to counsel.

There's no additional voir dire that's going to be gone into by the court, save for one particular

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[49 RT 5911]

[Ana Luciani]

Do you have any feeling that just because they -- this is a capital murder case, that the -- that Mr. Ayala is more likely to be guilty than if you came in here and it was an auto theft case?

A I would have to hear the evidence.

Q Okay. You made no decisions yet?

A No.

Q Our whole process when we were questioning you individually about the death penalty and we kept hammering on the death penalty and scenarios, "what do you think about this? What do you think about that?" is there any feeling in your mind that you brought in when you came over to this building -- and maybe coming into this building was able to wash it out of everyone's minds because we've had a change of scene, but is there anything in your mind right now that makes you feel that -- that Mr. Ayala is not absolutely innocent of these charges?

A (No audible response,)

Q Okay. I got a blank stare. Let me try again. Mr. Ayala -- in a criminal case we come in here, the prosecution has made allegations of murder. That puts the burden of proof on the prosecution. They have to prove this to you, and Mr. Ayala is innocent of these charges. He's presumed to be innocent. He stays innocent. And the only time that that presumption of innocence leaves him is after the jurors have heard all of the evidence, discussed it in the jury room, and 12 of them have said, "guilty," and then and only then for the first time is he not innocent. Okay? I

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San Diego County Superior Court
[Title Omitted in Printing]

[50 RT 6091]

THE COURT: Pass for cause?

MR. WOODWARD: Yes.

THE COURT: Can we get the microphone?

Ladies and gentlemen, let me remind you that we will now come to that part where the attorneys will be exercising their peremptory challenges.

Again, I would remind you that when you receive your white card, you'll go back over to the state courthouse, back to the jurors' lounge, and turn your card in there.

At this point, the court would thank and excuse juror number eleven, Mrs. Walker.

The procedure will be consistent.

Mr. Garrow, you'll take the empty seat, sir, and it will keep going down.

When there's an empty seat, those of you next in order will take that empty seat.

MR. SHEELA: Excuse me.

THE COURT: People's first peremptory.

MS. FRANCO: Your honor --

MR. SHEELA: Shouldn't the first alternate go into that seat, your honor?

THE COURT: I'm sorry. You're correct. I misspoke myself.

Alternate number one, Miss Luciani.

THE COURT: People's first peremptory.

MR. WOODWARD: Thank you, your honor.

The people would thank and ask the court to

[50 RT 6092]

excuse juror number eight, Mr. Cutshall.

THE COURT: Thank you for your participation, sir.

Defendant's first peremptory.

MR. SHEELA: Ask the court to thank and excuse jurors number two, Mr. Rollins.

THE COURT: Mr. Rollins, thank you for your participation, sir.

All the way down, sir.

Now, I'm right.

PROSPECTIVE JUROR GARROW: It was comfortable.

THE COURT: People's second peremptory.

MR. WOODWARD: Your honor, the people would thank and ask the court to excuse juror number nine, Miss Cogswell.

THE COURT: Miss Cogswell, thank you for your participation, ma'am.

Defendant's second peremptory.

MR. SHEELA: We would ask the court to thank and excuse juror number three, Mr. Jeffcoat.

THE COURT: Mr. Jeffcoat, thank you for your participation, sir.

People's third peremptory.

MR. WOODWARD: Your honor, the people would thank and ask the court to excuse juror number three, Mr. Somerville.

THE COURT: Mr. Somerville, thank you for your participation, sir.

PROSPECTIVE JUROR SOMERVILLE: Thank you.

THE COURT: Defendant's third peremptory.

MR. SHEELA: We'd ask the court to thank and excuse

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[50 RT 6094]

People's sixth peremptory.

MR. WOODWARD: Again, may we have a moment?

THE COURT: You may.

(Off-the-record discussion.)

MR. WOODWARD: Your honor, the court would thank and ask the court to excuse juror number eight, Mr. Dallas.

THE COURT: Mr. Dallas, thank you for your participation, sir.

MR. SHEELA: May we approach the bench, your honor?

THE COURT: With the reporter?

MR. SHEELA: Yes, please.

(The following proceedings were held in the back hallway:)

MR. SHEELA: Your honor, the defense would object to the prosecution's use of peremptory challenges to exclude persons of Afro-American extraction.

Mrs. Walker, while not excused by a peremptory challenge, was part of a challenge made by the prosecution to her on the basis of publicity, that was then renewed this morning on the basis of her professed problem in looking at the evidence, and the court granted that challenge for cause.

I think technically that probably does not count into the Wheeler count, but she was of Afro-American extraction.

There have been other -- two others who have hit the box. Galileo Somerville was excused by a

[50 RT 6095]

peremptory, and the most recent peremptory was for Olanders Dallas.

MS. MICHAELS: Walker was black?

MR. WOODWARD: We talked about that before.

MR. SHEELA: So this is the second of their peremptory -- second of six peremptories used for an Afro-American juror, and every person of Afro-American extraction has been excused that has hit the jury box, by the prosecution.

THE COURT: Well, that's not quite accurate.

As you've indicated, there was a challenge for cause granted as to miss walker by the court because of the juror's inability, really, to give consideration to all evidence that might be introduced.

Mr. Somerville is of Afro-American descent.

As is Mr. Dallas of Afro-American descent.

Do you have --

MR. SHEELA: Your honor, I think that that -- that this has demonstrated a pattern on the part of the prosecution to excuse everyone of Afro-American descent who is a prospective juror who gets into the box, and who might be considering the case.

THE COURT: Well, I'm not at this point sure, Mr. Sheela, that a prima facie case has been made by the defense.

I will for the record, because of the nature of this case, inquire as to the theory as to the excusal of Somerville, as well as Dallas, by The People.

MR. WOODWARD: I can do that, but I would do it in

[50 RT 6096]

chambers, without the presence of counsel present.

They are not entitled to our strategy.

THE COURT: Well --

MR. SHEELA: But I think I -- I think I am entitled to be present with respect to their statement, to the extent that their arguments -- that their statement is a misstatement of the facts, and I think

I'm entitled to at least make sure the record is clear as to what the statement of facts is.

With respect to strategy, I certainly don't want to pry into the strategy.

THE COURT: With reference to the statement of facts, in all candor, I've indicated that at this point, I'm not sure, Mr. Sheela, that the defense has stated facts sufficient to establish a prima facie case.

Because of the nature of this particular case, I want a complete record, and to that extent, then I do want to have the statements of the prosecutor on the record.

MR. SHEELA: Your honor, maybe I can make a better showing as to prima facie.

I think that the mere fact that the peremptory challenges were not exercised seriatim does not mean that there's not a pattern developing.

The excusal of a non-Afro-American person in between the excusal of two or three of them does not lessen the pattern. That's merely a head fake to make it look like it's not a pattern.

I recognize that he's exercised peremptory challenges on persons of non-Afro American extraction.

[50 RT 6097]

Mr. Somerville was challenged the moment he hit the box. That was the first time Mr. Woodward could use the challenge on him.

With Mr. Dallas, he let him sit for probably I think two rounds, perhaps three, before he exercised the challenge on him, but nevertheless, the fact that he didn't bump him immediately does not lessen the pattern aspect.

It merely --

THE COURT: I think that Wheeler-Williams and its progeny are clear as to the definition of a

pattern, and again, I will get the further statements on record.

Let me-- at this point, because we do have the jurors sitting there in the box, we're going to go with the next twelve. The defense has made its record at this point.

We'll pull in the next twelve people to be examined, and at the first recess, then I'll deal with the statement re: Mr. Woodward and his strategy.

MR. SHEELA: Thank you.

(The following proceedings were held in open court in the presence of the prospective jury:)

THE COURT: Ladies and gentlemen, to most, if not all of you, you're familiar with that procedure. I apologized during the process of your individual questioning, and explained at that time that the reason for that is that once selected as a juror, you become the exclusive judges of the

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[50 RT 6121]

[Luis Macias]

Q Would your answers be about the same?

A Well, I do have an issue over the death penalty.

It's beginning to bother me.

Q Now, that was something that we had discussed earlier in private, and let's-- let's not address it now. I'll take it up at-- we're probably due for a recess. We'll discuss it with the judge at the recess.

Let me ask my other questions.

With respect to the felony conviction, the fact that a witness in the case may have a felony conviction, to the extent the law permits it, will you take that into account?

A Yes, I will.

Q But the law does not permit you to automatically just say, "look, the guy is a felon, I reject his testimony automatically.

You would not do that, would you?

A No.

Q You had not sat as a juror before?

A No, I have not.

Q With respect to the way the process works, the adversary system where the prosecution goes first, you are going to hear their witnesses first, opening statements first, then for a long time first, and then and only then would the defense present evidence if we decided there's witnesses that need to be presented to tell you more that the prosecution does not call, can I get you to do what --do the best you can to avoid making up your mind or leaning any way in this case

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[50 RT 6134]

team you're picking." I can say I'm going to be fair, but I'm not going to be fair. I'm not going to root for the Dodgers, no way. I wouldn't give them a fair choice.

You have to be able to say that you got to that point -- and the evidence would have to push you to that point. But if you got there, you'd honestly look at both choices, honestly look at them. Can you do that?

A Well, I would -- I guess I would try. I can't-- I can't be certain about that. I just -- I'm kind of caught in between both -- both ends of it, but I would give it a try.

MR. SHEELA: Okay. I think they may have -- I have no further questions. Mr. Woodward may have-- (pause.)

THE COURT: Mr. Woodward.

MR. WOODWARD: Yes.

Examination

By Mr. Woodward:

Q Mr. Macias, obviously we talked to you before on all this, so something has happened between then and now. What is it?

A I just had time to reflect on the issue of death and how it may relate to this case. As I said before, I thought I -- I would be strong enough if it went that way, that I would vote for that issue, you know, death, if aggravating circumstances came to that and directed me that -- that -- to that direction. But reflection gives you time to think and-- and your own upbringing and my own special thoughts on the issue of would I ever be in that situation

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[50-1 RT 6184]

San Diego, California- Tuesday, 5-2-89 – 12:00 p.m.

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(The following proceedings were had in open court, out of the presence of defense counsel and the defendant:)

THE COURT: Okay. Let the record reflect that all parties are absent from the courtroom save the prosecution.

This is with reference to the further record as to Mr. -- the challenge -- peremptory challenge of Mr. Dallas, and I guess it would also involve --

MR. WOODWARD: Mr. Somerville.

THE COURT: --Mr. Somerville.

MR. WOODWARD: As far as. Mr. Somerville is concerned, I would indicate that the reasons are legion.

He indicated during questioning of Hovey a -- an attitude with regard to the justice system which demonstrated in my view a nonconformist person who has had numerous run-in's with the law. We determined through his rap sheets that he has three or four more arrests other than those that he has told us about. He was arrested for a drug offense for which he was diverted. He told us in the voir dire process that he had had one drunk driving case in 1984. In fact he'd had two in the same year from different courts.

In addition to that there were two other arrests, one resulting in a diversion for -- for drugs.

And his attitude is such that I think it would create alienation and hostility on the part of the other jurors. Even though I found him to be a very refreshing

[50-1 RT 6185]

individual and probably extremely intelligent, that was the primary basis for his being challenged.

THE COURT: With Mr. Somerville I might indicate that with reference to the other arrests this was information that was shared with defense counsel prior to the group questioning. I would indicate that certainly the answers as well as the demeanor of Mr. Somerville caused this court to believe that certainly there was a. healthy paranoia, if you will, concerning the justice system.

MR. WOODWARD: As far as Mr. Olanders Dallas is concerned, my primary concern with regard to Mr. Dallas is his ability to vote for the death during the penalty phase. On his questionnaire he indicated that he does not believe it the death penalty. He did indicate that his view had changed over the last several years. He told us that he did want to serve. During the time that he was questioned, I felt that his responses were not totally responsive to the questions of either counsel for the defense or myself.

My observations in reading his questionnaire and before even making note of his racial orientation was that his responses on the questionnaire were poor. They were not thought out. He demonstrates a lack of ability to express himself well. And his answers did not make a lot of sense. As a result, I felt that he is not a person who could actively participate in a meaningful way in deliberations with other jurors, and his ability to fit in with a cohesive group of 12 people I sincerely question, and it was for that reason plus his stand on the death penalty

[50-1 RT 6186]

that led me to believe that did not want him in this jury.

THE COURT: Okay. Certainly with reference to or not he would get along with 12 people, it may well whether be that he would get along very well

with 12 people. I think the other observations of counsel are accurate and borne out by the record.

MR. WOODWARD: Fine. Thank you, your honor.

THE COURT: That portion of the transcript will be sealed pending further court order to the extent that it divulges certainly to some extent prosecution strategy in terms of jury selection.

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[50 RT 6216]

THE COURT: Mr. Esbeck, you want to move over to the vacant seat, sir?

People's seventh peremptory.

MR. WOODWARD: Your honor, the people would thank and ask the court to excuse juror number ten, Mr. Barrow.

THE COURT: Thank you for your participation, sir.

THE COURT: Defendant's seventh peremptory.

MR. SHEELA: We'd ask the court to thank and excuse Mr. Esbeck, juror number four.

THE COURT: Thank you for your participation, sir.

Miss Collard.

People's eighth peremptory.

MR. WOODWARD: Your honor, the people would thank and ask the court to excuse juror number ten, Mr. Adams.

THE COURT: Mr. Adams, thank you for your participation, sir.

Defendant's eighth peremptory.

MR. SHEELA: We'd ask the court to thank and excuse Miss Collard, juror number four.

THE COURT: Thank you for your participation, ma'am.

People's ninth peremptory.

MR. WOODWARD: Your honor, the people would thank and ask the court to excuse juror number ten, Mr. Macias.

THE COURT: Mr. Macias, thank you for your participation, sir.

THE COURT: Defendant's ninth peremptory.

MR. SHEELA: One moment, your honor.

(Off-the-record discussion.)

[50 RT 6217]

MR. SHEELA: Ask the court to thank and excuse juror number one, Miss Lutap.

THE COURT: Thank up for your participation, ma'am.

People's tenth peremptory.

MR. WOODWARD: May we have just a moment, your honor?

THE COURT: You may.

(Off-the-record discussion.)

MR. WOODWARD: Your honor, the people would thank and ask the court to excuse juror number ten, Mr. Ortiz.

THE COURT: Mr. Ortiz, thank you for your participation, sir.

MR. SHEELA: May we be heard at side-bar?

THE COURT: Again, ladies and gentlemen, I apologize for the procedure.

With reporter, please.

(The following proceedings were held in the back hallway:)

MR. SHEELA: It would be our objection to the challenge and excusal of Mr. Macias and Mr. Ortiz. That is one hundred percent of the jurors of Hispanic extraction that have gotten in the jury box.

It is the last -- the prosecution's last two peremptory challenges, and if the record does not reflect it somewhere else, my client is of Hispanic extraction.

THE COURT: Well, in California, sir, it does not make a difference whether your client is of Hispanic or Anglo extraction. Each defendant is entitled to a representative

[50 RT 6218]

jury, which is all ethnic groups, and I will note that both jurors that you've mentioned are of Hispanic extraction.

Do you have anything further to state for the record?

MR. SHEELA: No, your honor.

THE COURT: Okay. Again, I don't think the record at this point is sufficient for the prima facie showing.

However, again I'm going to request an independent statement for the record with reference to the people's challenge of both Hispanic jurors.

MR. SHEELA: Your honor, I -- I recognize I -- I didn't know whether to -- I figured I -- I need to object now, even though the court has allowed Mr. Ortiz to leave the courtroom. I recognize we can catch him at the elevator, if you were going to grant my challenge, or grant my objection, and that's why I made it now, as opposed to waiting for a recess.

THE COURT: Okay.

MR. SHEELA: I suppose I should ask the court, should I ask -- if this happens again, and I want to make another Wheeler objection, should I do it before we let the juror leave the courtroom, or is this procedure acceptable?

THE COURT: Well, no. I think that basically with the challenge, if you would request something innocuous -- I don't know how much more innocuous you can be, but I think that -- because basically, if I feel that there is a sufficient -- or that a sufficient showing can be made, then I want to give The People an opportunity, prior to the juror leaving, so that we can make that determination for the record.

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[50 RT 6220]

THE COURT: The parties are present. The record will reflect.

Defendant's tenth peremptory.

MR. SHEELA: We'd ask the court to thank and excuse juror number eight, Miss Chambers.

THE COURT: Miss Chambers, thank you for your participation, ma'am.

People's eleventh peremptory.

MR. WOODWARD: Your honor, the people would thank and ask the court to excuse juror number three, Mr. Edwards.

THE COURT: Mr. Edwards, thank you for your participation, sir.

People's twelfth peremptory.

Well, strike that.

Defendant's eleventh peremptory.

MR. SHEELA: Just a moment, your honor.

(Off-the-record discussion.)

MR. SHEELA: We'd ask the court to thank and excuse juror number eight, Mr. Hickey.

THE COURT: Mr. Hickey, thank you for your participation, sir.

People's twelfth peremptory.

MR. WOODWARD: May we have just a moment, your honor?

COURT: You may.

(Off the record discussion)

MR. WOODWARD: Your honor, The People would thank you and ask the court to excuse juror number two, Mr Garrow.

THE COURT: Mr. Garrow, thank you for your

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[50 RT 6252]

[Robert Martinez]

I have no more questions, your honor.

THE COURT: Anything additional?

MR SHEELA: Nor do I, your honor. Thank you, Mrs. Crellin.

THE COURT: Mrs. Crellin, again I appreciate the fact that you would share that with counsel. You 're absolutely correct in doing so.

PROSPECTIVE JUROR CRELLIN: (exits courtroom.)

THE BAILIFF: Who is up next, your honor?

THE COURT: Well, one second, please.

As to Miss Crellin, counsel desire to make any further record?

MR. SHEELA: No, your honor.

MS FRANCO: No, your honor.

MR. WOODWARD: No.

THE COURT: Okay. Let's -- Mr. Martinez. I don't think he'll be as long.

PROSPECTIVE JUROR MARTINEZ: (enters the courtroom.)

Robert Martinez

Examination

By the Court:

Q Mr Martinez, in response to Mr. Sheela's question, you had indicated that you had become aware or had heard some publicity. To the best of your recollection, I want you to share with us exactly what it is that you became aware of, sir.

[50 RT 6253]

A Just merely the fact of jury selection. It wasn't a large article or anything. It's just – something along the line that was -- the jury was being selected on the Ayala case and this and that, and that was about it.

Q Okay. Is there anything else in the article, sir?

A No. It was an article about yeah big. (gesturing.)

MR. SHEELA: He's indicating about two-inches large, your honor

THE COURT: Counsel have further inquiry?

MR. SHEELA: No, your honor.

MR. WOODWARD: No.

THE COURT: Okay, Mr. Martinez. You're well aware of the court's admonition.

PROSPECTIVE JUROR MARTINEZ: Yes.

THE COURT: Okay. Follow it, sir. Don't discuss it with anyone. Okay? Thank you.

PROSPECTIVE JUROR MARTINEZ: (exits courtroom.)

THE COURT: Counsel desire further record as to Mr. Martinez?

MR. SHEELA: Your honor, I -- only that I know the court is aware of the one article that Mr. Flather brought in that was about three-and-a-half or four inches.

There was also about a two- inch article, similar at least in size to the one Mr. Martinez described that mentioned -- that was in the evening paper , and I think it mentioned only that jury selection was underway. There was

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[50 RT 6260]

A That's correct.

Q Would your answers be about the same a yes.

Q Is there anything significant in addition to all the information you've already given us in individual questioning and in the questionnaire that you think we need to know about you?

A No.

Q Will you hold the prosecution to its burden of proving Mr. Ayala guilty beyond a reasonable doubt?

A Absolutely.

Q And if they cannot do that, or if they don't do that-- whether they can or can't, if they don't do that in this case could you return a verdict of not guilty even though this is a capital murder case?

A Yes, I could.

MR. SHEELA: Okay. Thank you, Mr. Martinez. I pass for cause, your honor.

THE COURT: Miss Michaels.

MS. MICHAELS: Thank you, your honor.

Mr. Martinez, you can keep that. We'll start with you.

Robert Martinez

Examination

By Ms. Michaels:

Q Mr. Martinez, sir, let me turn the question

[50 RT 6261]

around. If the evidence in this case convinces you beyond a reasonable doubt that this defendant is guilty of the crimes, will you have any hesitation in returning that verdict to this court?

A No. I'm pretty open-minded about that.

Q Pardon me?

A I'm very open-minded. I could -- I have to be convinced.

Q You'll be true to the facts?

A Yes, I will.

Q You realize that the -- the crimes in this case occurred four years ago last Wednesday. Would you by virtue of that fact understand that there may be a slight failure of recollection, some details may be a little fuzzy in some of the witnesses' minds?

MR. SHEELA: Objection. This asks the witness to prejudge the evidence.

THE COURT: Sustained.

By Ms. Michaels:

Q Would you -- could you accept that witnesses may not remember all details that occur or did not occur at the crime scene?

MR. SHEELA: Same objection, your honor.

THE COURT: Sustained. It's requesting a prejudgment.

By Ms. Michaels:

Q If you were to hear that a witness received immunity, what does that -- how does that make you feel? What kind of flag or alarm goes off in your mind when you hear the

[50 RT 6262]

word "immunity"?

A To tell you the truth, I don't -- you know, it's a difficult question. I don't know. I don't have--I'm open toward that question. He was given immunity for whatever. I mean, reason may not pertain to this case, it may pertain to this case. Then again, he may -- that's a hard question, let's put it that way. I'll leave it at that.

Q So you haven't been exposed to anything that would cause you to either distrust such a witness automatically or to automatically accept everything he says?

A Well, I've never been on a jury, so I can't say.

Q Have you followed any kind of -- any court cases in the news or come downtown to watch any trials?

A Well, I followed the Saigon Penn case.

Q All right. I don't think there was an issue of immunity in that case, so basically if you were to hear about immunity you would still be able to judge the witness based upon the kind of testimony he gave?

A I certainly would. Yes, I would.

Q The same standards you would use in judging the believability of other witnesses?

A Yes, I would.

Q Okay. And the same kind of questions with respect to a felony record.

A Yes.

Q Do you think that you could fairly judge the testimony of a felon to determine whether or not he's telling the truth?

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[50 RT 6280]

[Douglas Streed]
if -- if pressed. To have to do it I would -- if during -- after all of the facts were in and all. Of the testimony given and there was conflicts -- and, quite frankly, I think there are going to be conflicts. I think the jury is going to have to weigh facts. I would look at all facts that are in conflict with some skepticism, trying to sort them out.

I wouldn't feel that either side would put somebody up there to intentionally lie, and I would feel that either side if they put a person in the witness stand they have already believed that person.

So -- but I would not categorically or anything close to that refuse the testimony because of a background that had been discussed.

Q Do you feel confident in your own ability to discern the truth so as to arrive at a verdict or that would -- let me start over.

Do you feel confident in your ability to discern the truth so that you could if you were seated as a juror, Mr. Streed, try your best to determine the truth of what happened and so as to find the facts, in accordance with the actual truth, of course?

A Well, I've given that some thought as far as in my business I'm not lied to very often. I don't think I'm ever lied to intentionally. Lying wouldn't even be the right word. I've maybe been given wrong information, but I don't think it was lie.

The last time I was knowingly lied to that

[50 RT 6281]

I've detected three of us were lied to, and I detected it immediately from a person that I hadn't known before. As we were walking away, the other two took it for gospel, and I said, "he is lying," and it turned out that that particular California highway policeman was lying.

So -- it had nothing to do -- actually while we were hunting, somebody told us we were on private land, he did, and in fact we thought we were on public land; and as we were leaving to go somewhere else I said, "he's lying," and we investigated and found out in fact he was.

Q Did you feel he was mistaken or lying?

A I felt he was lying.

Q What was it that caused you to feel that?

A The man that gave us the information told us he was lying, because he, the man that I got the correct information from, was actually a member of his hunting party; and he said he knew clearly where the private property started, and in fact he lied.

Q Oh. This was -- was this a California highway patrolman that you encountered --

A In Colorado.

Q --while he was hunting?

A Correct.

Q And then he put on his C.H.P. hat--

A We just happened -- he just happened to-- I just indicated we ran into a man down there hunting, and I didn't tell that person where he said that the

property line was. I said, "but we're trying to define the property line.

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[50 RT 6299]

[George Stamos]

A Now, I felt I was able to. Now, whether I was or not I don't know

Q You don't know whether afterwards--

A I can't recall afterwards saying, "Boy, you really fooled me that time."

Q Okay. You sat on a prior jury. Do you feel that in that case you were able to tell whether or not the witnesses -- well, first of all, did you have to decide --or resolve conflicts in the testimony of witnesses?

A No. It was a judgment phase, I think is what it's called. It was, I guess, mostly assessing the damage.

Q Oh, this was a civil case?

A Right.

Q And the issue before you was money and not liability?

A Right.

Q Had liability or who was responsible already been established?

A Yes.

Q And so, then, the case was brought in -- or the jury was brought in to decide what money should be awarded one side or the other?

A Correct.

Q And -- now, that case was civil, right?

Q Yes.

A So it did not require that it be unanimous?

A That's correct.

A You understand, of course, that a criminal case

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San Diego County Superior Court
[Title Omitted in Printing]

[51-1 RT 6305]

(The following proceeding was held in the back hallway:)

MR. WOODWARD: I have to refresh my recollection. Okay.

THE COURT: Let me get my chart.

We're off the record.

(Discussion off the record)

THE COURT: Let the record reflect, then, we are at side-bar, outside the presence of all parties, save for the prosecution.

This is for purposes of further record.

MR. WOODWARD: We challenged, peremptorily, Luis Macias, who is the person on the record yesterday that indicated, in my view, that he has had second or perhaps even third thoughts with regard to the death penalty.

He is also a person who went out and investigated this case, and I don't know what he learned, but having no control over that, I did not feel confident with him being on this case, plus the fact that when he was in the service, in the military, he left the military at the rank of E-2, suggesting some sort of misconduct or inability to perform up to the standards of the military, and therefore, felt that he would not be an appropriate juror.

THE COURT: The record should reflect again that the court is mindful of the mandate of Wheeler.

While the court has not seen fit to find it sufficient in terms of the three prongs spelled out in Wheeler

[51-1 RT 6306]

with reference to the defense offer, the court, because of the Nature of this case, has chosen to make an additional record.

Clearly, what Mr. Woodward has indicated to Mr. Macias is a bias based upon individual, as opposed to group.

Mr. Macias was very clear yesterday, and there was a challenge for cause for those reasons that was denied by the court.

MR. WOODWARD: As far as Mr. Ortiz is concerned, I made an observation of Mr. Ortiz when he first entered the courtroom on the first day that the jurors were called into that area.

At that time, he appeared to not fit in with anyone else. He was a standoffish type of individual. His dress and his mannerisms I felt were not in keeping with the other jurors.

He indicated to us at the beginning that he was illiterate. Actually, his words were that he was illiterature, and that he therefore had the questionnaire translated to him, so that he could make responses.

I observed him on subsequent occasions when he came to the court, and observed that he did not appear to be socializing or mixing with any of the other jurors, and I also take into account his responses on the questionnaire and in the Hovey questioning process, at which time he expressed that he had no feelings with regard to the death penalty in writing.

When being questioned, he said that he was

[51-1 RT 6307]

not sure if he could take someone's life, or if he could take someone's life into his hands.

He further responded in the Hovey process that there would be eleven other people, that he felt a little shaky as far as his responsibilities in this case.

For those reasons, I felt that he would be an inappropriate juror, and for that reason, exercised the peremptory challenge.

THE COURT: Again, the court is mindful not only of Wheeler, but its progeny, with particular reference to the recent case of People v. Johnson, wherein the court indicates that the subjective factors, if you will, that are discerned by counsel can certainly be a legitimate basis for an individual challenge if, in fact, those subjective notions are borne out, and are legitimate, and not subterfuge.

Our record documents the factors that were indicated by Mr. Woodward in terms of the prospective juror's responses, as well as the fact that the questionnaire was in fact filled out.

To the extent that the people, and for that matter, the defense, might not have any independent decision by this juror clearly focuses on the individual, as opposed to the group, in terms of the assessing the peremptories.

MR. WOODWARD: Thank you, your honor.

THE COURT: That's sealed, pending further court order.

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[51 RT 6309]

receive your white card, it's an easier process now. Go back downstairs to the jurors' lounge.

Defendant's twelfth peremptory.

MR. SHEELA: We'd ask the court to thank and excuse juror number eight, Miss Spielmann.

THE COURT: Thank you for your participation, ma'am.

People's thirteenth peremptory.

MR. WOODWARD: Your honor, the People would thank and ask the court to excuse juror number eight, Mr. Stamos.

THE COURT: Mr. Stamos, thank you for your participation, sir.

MR. SHEELA: Your honor, may we be heard at side-bar?

THE COURT: The record will reflect timely objection.

Defendant's thirteenth peremptory.

MR. SHEELA: We'd ask the court to thank and excuse juror number six, Mr. Steed.

THE COURT: Mr. Steed, thank you for your participation, sir.

People's fourteenth.

MR. WOODWARD: Your honor, the people are satisfied with the panel as now constituted.

THE COURT: Defendant's fourteenth.

MR. SHEELA: We'd ask the court to thank and excuse juror number ten, Mr. Blakesley.

THE COURT: Thank you for your participation, sir

People's fourteenth peremptory.

MR. WOODWARD: Your honor, the people would thank and ask the court to excuse Mr. Lavenstein.

[51 RT 6310]

THE COURT: Thank you for your participation, sir.

Defendant's fifteenth.

MR. SHEELA: We'd ask the court to thank and excuse juror number ten, Mr. Cupples.

THE COURT: Thank you for your participation, sir.

(Prospective juror Cupples claps hands)

MR. SHEELA: You're welcome, even if you waited long enough, huh?

THE COURT: People's fifteenth peremptory.

MR. WOODWARD: Your honor, The People are satisfied with the panel as now constituted.

THE COURT: Defendant's sixteenth.

MR. SHEELA: We'd ask the court to thank and excuse juror number six, Mr. Swenink.

THE COURT: Thank you for your participation, sir

People's fifteenth.

MR. WOODWARD: Your honor, The People would thank and ask the court to excuse juror number six, Mrs. Crellin.

THE COURT: Mrs. Crellin, thank you for your participation, ma'am.

Defendant's seventeenth.

MR. SHEELA: One moment, your honor.

(Off-the-record discussion.)

MR. SHEELA: We'd ask the court to thank and excuse juror number two, Reverend Simpson.

THE COURT: Reverend Simpson, thank you for your participation, sir.

People's sixteenth.

[51 RT 6311]

MR. WOODWARD: Your honor, the people would thank and ask the court to excuse juror number six, Mrs. Santos.

THE COURT: Mrs. Santos, thank you for your participation , ma'am,

MR. SHEELA: May we be heard at side-bar, your honor?

THE COURT: The record will note the objection, sir.

MR. SHEELA: We'd ask the court to thank and excuse juror number two, Mrs. Pellegrino.

THE COURT: One second, sir.

Defendant's eighteenth, juror number two.

MR. SHEELA: Yes.

THE COURT: Thank you for your participation, ma'am.

People's seventeenth.

MR. WOODWARD: Your honor, The People would thank and ask the court to excuse juror number six, Mrs. Brodie.

THE COURT: Mrs. Brodie, thank you for your participation, ma'am.

Let's call six; six alternates.

THE CLERK: Number one, James Harper, H-A-R-P-E-R.

Number two, Charles Gindt, G-I-N-D-T.

Number three, Dorothy Hagen, H-A-G-E-N.

Four, Laurie Anderson.

Five, Wayne Woods.

Number six, James Noland, N-O-L-A-N-D.

THE COURT: Mr. Sheela.

MR. SHEELA: We're getting close, ladies and gentlemen, as you can tell, and just because we're close, that does not mean those of you in the back of the room should not pay

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[51 RT 6340]

participation, sir.

People's eighteenth peremptory.

MR. WOODWARD: Your honor, The People are satisfied with the panel as now constituted.

THE COURT: Defendant's twentieth peremptory

MR. SHEELA: One moment, your honor.

(Off-the-record discussion.)

THE BAILIFF: I have an emergency, your honor.

THE COURT: Okay. Take care of your emergency, sir. I'm afraid not to let you go.

MR. SHEELA: Sorry, your honor. Because it's our last one, let me make sure.

We'd ask the court to thank and excuse juror number seven, Mr. Mancinelli.

THE COURT: Thank you for your participation, sir.

People's eighteenth peremptory.

MR. WOODWARD: Your honor, the people would thank and ask the court to excuse juror number six, Mr. Martinez.

THE COURT: Thank you for your participation, sir.

MR. SHEELA: Your honor, we object. We'd ask to be heard at side-bar.

THE COURT: Objection is noted for the record, sir. It is timely.

MR. SHEELA: May I be heard at side-bar on another matter?

THE COURT: After we complete the use of the challenges, sir.

MR. SHEELA: Your honor, it relates to the use of the

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[51 RT 6344]

MR. SHEELA: With respect to the excusal of jurors, Stamos, Santos and --excuse me, and -- excuse me-- Mr. Martinez, those were challenges, peremptory challenges that were made by the prosecution this morning.

I reviewed Mr. Stamos' questionnaire as to question 48, he indicates he is of Hispanic background, born in the United States.

The other -- and I believe that is also true of Mr. Macias.

Mr. Ortiz is of Hispanic origin, but was born in Mexico.

Those are --and Mr. Martinez is Hispanic, born in the United States.

The prosecution has challenged every juror who has hit the box that was a Hispanic born in the United States.

They have challenged one Hispanic that was born in Mexico. That would be Mr. Ortiz.

They have systematically used their challenges to bleach clean the box of people of minority persuasion.

Miss Santos is of African American extraction. She was challenged by the prosecution this morning.

That makes the third juror of African American extraction that has been peremptorily challenged by the prosecution.

Of their eighteen challenges that they've

[51 RT 6345]

used thus far, they have challenged four Hispanics and three blacks, and again, they have challenged all of those persons who have hit the jury box with the exception of Mr. Mancinelli, that I challenged, so they could not.

They waited. They still have challenges left. I don't know v/hat they would do if they had the chance.

THE COURT: I'm sorry. Reread the last comment, please.

(The record was read by the court reporter)

THE COURT: All what persons, sir?

MR. SHEELA: Your honor, all Hispanics .that – that have hit the box.

THE COURT: Okay. Mr. Mancinelli is Hispanic

MR. SHEELA: He was born in Mexico City, and indicates he's of Hispanic extraction but I challenged him, so --

MS. FRANCO: When the reporter read that back, it sounded like it was reading that. Mr. Sheela challenged him in order that the prosecution not be able to challenge him, and if it does read that way, it should not, because what he means is he challenged

THE COURT: Let Mr. Sheela state what he means, Miss Franco.

MR. SHEELA: I challenged him, I challenged him. He is not available for challenge right now.

They still have peremptory challenges. That's what I tried to say.

THE COURT: With reference to the ethnicity, I was unclear as to Mancinelli, but clearly, counsel's

[51 RT 6346]

representation as to the ethnicity of all other individuals challenged by the people is accurate, and that is every juror that's been available for challenge that has been Hispanic and/or black has been challenged by the people, and again, I'm assuming-- strike that-- save for Mancinelli, and I'm assuming that Mr. Mancinelli is Hispanic, based on counsel's representation.

Clearly, then, that would show a pattern of exclusion, if you will, of the minorities that have thus far hit the box, which certainly is prong one.

Was there additional record that you wanted to make, Mr. Sheela? Any additional record?

MR. SHEELA: Well, your honor, I suppose the additional record should go towards the juror's answers.

Each one of those jurors had indicated, in response to questions, that they could be fair to both sides in the case, and by asking my two hundred questions, that includes the question, "Is there anything you know that would keep you from being fair to both sides in the case?" So each of the jurors that they've challenged has indicated in response to questions, they can be fair to both sides in panel voir dire, in writing in their written questionnaires have indicated they could be fair to both sides, and further, each one of those jurors had passed -- has passed through the Hovey screening process, and had indicated that they were not so --

(Miss Michaels exits courtroom)

(Miss Franco exits courtroom)

MR. SHEELA: --predisposed--

[51 RT 6347]

(Miss Franco enters courtroom)

MR. SHEELA: --to the imposition of the death penalty that they would be unable to serve, and if -- most of these people --well, the record -- the record of the jurors' responses in questioning in the Hovey process, as well as here, is clear that these jurors are not significantly different from the white jurors that the prosecution has chosen to leave on the jury both in terms of their attitudes on the death penalty, their attitudes on the criminal justice system, and their attitudes on the presumption of innocence and

burden of proof, that I'm more concerned with generally.

That's the end of the record, I think, that I need to make.

THE COURT: Do you have any particulars?

Are you alluding to certain things, sir?

(Miss Michaels enters courtroom)

THE COURT: Do you have people in mind when you make those statements?

MR. SHEELA: Working backwards, with respect to Mr. Martinez, he felt that the death penalty should be used as a deterrent in the law. He felt that the death penalty should always be imposed in murder cases, based upon his questionnaire, and that it was further used too seldom, so at least with respect to attitudes on the death penalty, his questionnaire responses were pro-prosecution.

He -- he did express yesterday that he had some additional thoughts about the death penalty, but had indicated that he would be able to impose the death penalty in

[51 RT 6348]

an appropriate case.

With respect to Luis Macias, previously challenged by the prosecution, this is the social worker for child protective services. He -- he indicated that his views on the death penalty had changed, and we spoke with him additionally about his attitudes on the death penalty.

Actually, I confused him with Mr. Martinez. He's the one that came to us yesterday, and indicated that he had some further thoughts about the death penalty.

He indicated that he could impose it. He would require the prosecution and his fellow jurors to convince him it was the appropriate penalty.

In his questionnaire, he indicated that it was used too seldom, that no one had been executed in twenty years, and he felt that it should be always used in cases where the individual calculated and planned the murder of another person.

Gerardo Ortiz indicated that the death penalty was used too seldom. He was born in Mexico. He's the juror who has to travel for some distance, but the court had previously advised the jurors of that hardship. He did not ask for a hardship excuse at any time, and indicated in response to Mr. Woodward's questions that he was willing to serve as a juror in this case if he was selected.

With respect to Mr. Somerville, that I think everybody agreed was an interesting juror, and had interesting attitudes, Mr. Somerville's position was that he does not think in extremes. He would never say, "always

[51 RT 6349]

impose the death penalty," or "life in prison without the possibility of parole."

I handed in some of my questionnaires this morning to Miss Hale.

Let me look at -- Miss Santos indicated that the death penalty to her was used too seldom. She believed in the adage an eye for an eye, and felt that there were certain situations in which the death penalty should always be imposed.

She indicated that she knew of -- of no reason that she could not be fair.

She was asked about the death penalty -- excuse me -- about the burden of proof, and she says if the testimony substantiates the guilty finding, she would vote for it. If the testimony does not substantiate a guilty finding, she would not vote for it.

She was asked about her attitudes on the death penalty in Hovey voir dire.

She said, "I have no set opinions on the penalty."

I think that that's my best recollection of the attitudes of those various jurors, your honor.

MS. FRANCO: Your honor, I believe with Mr. Sheela, that whether or not the defense challenges a juror of Hispanic origin when they are making a Wheeler motion to the prosecution's actions is not relevant, but for purposes of the record, so that it's clear why we challenged Mr. Mancinelli, we would appreciate an opportunity --

[51 RT 6350]

THE COURT: There's been no objection raised.

MS. FRANCO: I just want to make sure that --

THE COURT: There's no objection raised.

MS. FRANCO: Okay. We do have strategic reasons for that.

THE COURT: There's no objection raised, Miss Franco. That's -- obviously, Wheeler goes to both parties, with the defense and the prosecution, but no objection has been raised as to the use of the defense challenge for Mancinelli.

Let me state that at this point, based upon counsel's recitation of the facts, the court will make a prima facie finding of exclusion based upon group, and will request a further clarification from The People.

MR. WOODWARD: Would the court do that in private, or are we requiring it for counsel?

THE COURT: I'll still allow-- because of the fact that the jury selection is still in progress, sir, I'll allow that to happen.

It will be a matter of record. It will happen in private.

MR. SHEELA: Does the court wish us to leave the courtroom?

THE COURT: Yes.

Miss Franco, one second before you go.

MS. FRANCO: Hold on. Well, never mind.

(Miss Franco exits courtroom)

(Mr. Sheela and defendant exit courtroom)

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[51 RT 6351]

(The following proceedings were held in open court out of the presence of the prospective jury, defendant and defense counsel:)

THE COURT: Let the record reflect, then, that we're now outside the presence of all parties, save for the prosecution.

Mr. Woodward.

MR. WOODWARD: Thank you, your honor.

Starting with Mr.-- I guess the challenge was as to Mr. Stamos -- Mr. Stamos is an individual who receives a -- in the selection process, a grade based upon the questionnaire, and then I assign a grade based upon my evaluation of his responses during Hovey. I also have a grade assigned by Mr. Ray Cameron, an investigator and psychologist who has read the questionnaire, and without seeing the person, simply evaluates the responses, and also a grade and overall impression from co-counsel Miss Michaels.

As far as Mr. Stamos was concerned, Mr. Cameron's grade was one on a scale of one to ten.

Miss Michaels' grade was a two.

THE COURT: One being high, or low?

MR. WOODWARD: One is at the low end.

THE COURT: Okay. You want to tell the jury to come back at 10:30?

THE BAILIFF: Thank you, your honor.

MR. WOODWARD: Miss Michaels' grade was a two, and my grade was essentially a one.

[51 RT 6352]

The factors that entered into that, among other things, first, I-- I can indicate honestly that I was not aware that he was Hispanic. I was thinking that actually he was Greek, but I wasn't paying attention to the racial aspect of the case.

He sat on a prior jury, and he indicated that he was the one hold-out with regard to whatever issue was being presented at that time.

That made me feel extremely uneasy, as far as having him be on this case.

During his responses at Hovey, one of his answers was essentially, "you probably don't want me to be a juror on this case."

When he was asked about imposing of the death sentence all the time, or imposing of the life sentence all the time, during the life sentence, there was an extremely long pause. He asked that the court rephrase the question, and after I perceived some reluctance, he indicated essentially his response was no.

He is an individual who, in his background -- he applied and was rejected back in 1969 to be a police officer. I don't know the reason for that rejection, but that causes me to be suspect perhaps some psychological aspects as far as he's concerned.

I further noted that in the questionnaire he appeared to place an undue emphasis upon the bible and upon the idea that basically god would punish and so forth and so on.

[51 RT 6353]

I don't feel like I can deal with that aspect in terms of the decision-making process, and it is for those reasons that I concluded that he would not be an appropriate juror in this case.

THE COURT: The record should reflect that with reference to Mr. Woodward's observations, they are accurate,

You indicated a positive contact with the police. That was the roommate that he lived with, but it's accurate that for whatever reason, he was not admitted to the department.

Clearly, police officers will be called upon to testify. To the extent that -- and his application is a matter of record -- or questionnaire. There's a lot of quotes, if you will, dealing with god and the bible. To the extent that that supplants an independent decision, I suspect certainly that is within the realm of reason in terms of the utilization of a peremptory challenge on a subjective, individual basis as opposed to group, and that is the finding of the court.

MS. MICHAELS: Your honor, if I may just for the record, I assumed Mr. Stamos was Greek, and had no indication that he was Hispanic until I drew that inference from counsel's request, or objection to the challenge.

THE COURT: That's important, but of no moment really in terms of this court's analysis, and I would indicate for the record that very clearly, I'm interested in discerning whether there is, in fact, a group challenge that's based upon an assumption of ethnicity, as opposed to underlying reasons

[51 RT 6354]

that are borne out by the record that are not afterthoughts or thoughts without a basis, in terms of the Wheeler challenge,

Mr. Woodward.

MR. WOODWARD: As far as Miss --Miss Barbara Santos is concerned, she presented an enigma to me from the very beginning.

During -- first of all, I can indicate, just for consistency's sake, in our scoring system, Mr. Cameron's score as far as Mrs. Santos was a six, Miss Michaels' score was a three, and my score essentially was a zero.

My expectation, frankly, was that the defense would probably kick Miss Santos for various -- I have that in reverse. Mr. Cameron graded her a three, Miss Michaels rated her a six.

During the questioning process, the individual questioning, I very quickly formed the opinion that there was something wrong with Mrs. Santos. Her responses were extremely slow, and I began to suspect that she was possibly under the influence of drugs.

During the questioning, she had a—an empty look in her eyes, slow responses, a lack of really being totally in tune with what was going on.

That was -- that occurred throughout the Hovey process, virtually all questions that she provided, and I found that her demeanor in court was consistent with her responses on the questionnaire.

In those responses, the answers that she

[51 RT 6355]

wrote did not appear to respond to the questions being presented.

For example, when asked to give her opinion with regard to the death penalty, she explained that she was Catholic, and then I quote, "I can't always agree."

I didn't know what that meant, but it didn't appear to be in response to the questionnaire.

She indicated with regard to whether the death penalty was used too often or too seldom, her answer was, and I quote, "children are killed," and I didn't know what that meant, but it didn't appear to be responsive to that area of questioning.

I made observations at that time that she appeared basically, upon her initial entrance into court, as appearing somewhat angry.

I felt that her answers did not make sense, that they did not relate to the questions presented, and I perceived that in the questioning process, she appeared to manifest a great deal of nervousness, almost to the point that she could not communicate with us at least during the initial questioning.

Her responses were all -- and I have this written on my card, and I remember them-- basically an expression of incomplete thoughts, pieces of thoughts, but the idea that she was really not there in reality, and it is for that reason that I determined that I don't think she would be listening to all the evidence, and I don't think that she would be relating well to the other jurors on this case.

[51 RT 6356]

It's for those reasons that I decided that she needed to be challenged peremptorily.

THE COURT: Let me indicate that with reference to Mrs. Santos' demeanor, I observed her demeanor, which was not unlike the demeanor of many people that came in. She was nervous and apprehensive, because it was in fact a brand new experience for her, so I did not depict that to be hostility.

I did, however, note the complete incomplete, if you will, answers, non sequiturs.

I'm not really sure of what that means.

I certainly cannot quarrel, Mr. Woodward, with your subjective impression, and the use of your peremptory challenge based upon her individual manifestation, as opposed to her ethnicity, which is that of African American.

MR. WOODWARD: As far as Mr. Robert Martinez is concerned, Miss Michaels and I had discussions during the selection process here in court, even as late as immediately before the exercise of the last challenge.

The court would note that I had passed at one point, leaving Mr. Martinez on.

I have always felt some degree of reluctance with regard to Mr. Martinez, and my concern primarily is in the area of whether, after conviction, Mr. Martinez would actually vote for the death

penalty, and it was my view that taking all of his responses in Hovey into account, and the -- some of his responses even as late as yesterday -- for example, the following of the Sagon Penn

[51 RT 6357]

case. It was Miss Michaels doing the questioning at that time, and I did not actually -- it would have been possibly a disadvantage or a disservice to inquire further as to his impressions about the Sagon Penn case.

I'm concerned about that case because of the fact that Mr. Penn, in a very notorious trial here, was found not guilty in a second trial, and allegations of misconduct with regard to the District Attorney's Office and the police were certainly rampant in that case.

There's really no way for me to inquire as to where Mr. Martinez actually stood.

As far as Mr. Martinez is concerned, our scores, a combination of all the factors-- Mr. Cameron graded Mr. Martinez as a four, Miss Michaels had rated Mr. Martinez as a five, and my score on him was a four to a five, somewhere within that area.

I had, before doing any of the selection process, resolved that at the very best, we would not wish to have any jurors on this case whose combined score was a five or less.

In spite of that, I passed once on him, but it is my view, basically, that because of his attitudes with regard to the death penalty, such as in his first response as to whether he would always vote for-- well, in the question number one about whether he would always vote for guilt, he indicated that it was a difficult question.

He said that he believed in the death penalty, but it was hard for him to be involved in the death

[51 RT 6358]

penalty.

With regard to questions about whether he would vote for death, he said no, it would be hard to say, no, I don't know what the evidence is, and Miss Michaels' reasons, which she expressed to me, and I have to agree with, is a great degree of concern about whether if we get to that point, he could actually vote for death, and having that kind of a question in my mind as I'm trying this case would be distracting and worrisome to me during the process of the trial.

THE COURT: Okay. Well, again, his questionnaire would tend to indicate a person that is certainly pro the death penalty.

As counsel points out, his answers varied somewhat to the extent that individually, there may well be a legitimate concern as to whether or not he could impose it.

Certainly, I would assume an appropriate use of a peremptory would be for a person that any party feels either could not vote for death or could not vote for life.

That's sealed, pending further court order.

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[51 RT 6360]

San Diego, California - Wednesday, 5-3-89 - 10:37 a.m.

--000--

THE COURT: While we're-- counsel. (handing documents.)

I would intend to pass that out to the lucky 18.

MS. FRANCO: That looks wonderful.

THE COURT: Copy it for your records. That's a memento.

MR. WOODWARD: What is it?

MS. FRANCO: My headache is starting to abate already.

THE COURT: Let the record reflect that the court met and made a complete record. That record is sealed pending further court order.

The Wheeler motion has been noted by The Court. It will be denied for the record and counsel, but there is a complete record.

Okay.

THE BAILIFF: Ready for the jury?

THE COURT: Yes.

(At 10:37 a.m. the jury panel entered the courtroom and the following proceedings were had:)

THE BAILIFF: The panel is complete, your honor.

THE COURT: The record will so reflect. All prospective jurors, parties are present.

People's 19th peremptory.

MR. WOODWARD: May we have just a few seconds, your

[51 RT 6361]

honor.

(pause in proceedings.)

MR. WOODWARD: Your honor, the people are satisfied with the panel as now constituted.

THE COURT: The 12 jurors in the box, if you would stand and be sworn, please.

THE CLERK: You and each of you do understand and agree that you'll well and truly try the cause now pending before The Court and a true verdict render according only to the evidence presented to you and to the instructions of the court?

THE JURY: (affirmative responses.)

THE CLERK: Thank you.

Please be seated.

THE COURT: Ladies and gentlemen, as previously indicated, we will select six alternates.

There will be an additional six challenges per side.

As to the alternates. As to the alternates, people's first peremptory.

MR. WOODWARD: The People would pass at this time.

THE COURT: As to the alternates, defendant's first peremptory.

MR. SHEELA: We'd ask the court to thank and excuse Mr. Noland, no. 3.

THE COURT: Mr. Noland, thank you for your participation, sir.

Madam clerk, if you will draw four names.

[51 RT 6362]

Miss Anderson is now alternate one. Mr. Woods is alternate two.

In point of fact, why don't you just move up to the chairs, and that will make it easier.

THE CLERK: No. 3, Elisabeth Slutsky, S-L-U-T-S-K-Y.

No. 4, Janis Pierson, P-I-E-R-S-O-N.

No. 5, Linda Simeone, S-I-M-E-O-N-E.

No. 6, Lynda Tobiasson, T-O-B-I-A-S-S-O-N.

THE COURT: Mr. Sheela.

Elizabeth Slutsky

Examination

By Mr. Sheela:

Q I'm barely organized.

Good morning, Mrs. Slutsky.

A Good morning.

Q I have not been able to say this up until now, but I can guarantee that the most you'll be is an alternate juror, at least for now.

Are you willing to serve as an alternate juror?

A I don't know.

Q You don't know. Why don't you tell me about that?

A I don't think I would like it.

Q Now, you understand the reason we're-- in most cases we don't select six alternates. We're selecting that

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[51 RT 6429]

MR. SHEELA: We'd ask the court to thank and excuse Miss Mares-Clark, alternate number six, your honor.

THE COURT: Thank you for your participation, ma'am, as well as your patience.

As to the alternates, People's sixth peremptory.

MR. WOODWARD: Your honor, The People are satisfied.

THE COURT: As to the alternates, defendant's fifth peremptory.

MR. SHEELA: We'd ask the court to thank and excuse alternate number two, Miss Slutsky.

THE COURT: Thank you for your participation, ma'am.

As to the alternates, people's sixth peremptory.

MR. WOODWARD: Your honor, the people are satisfied.

THE COURT: As to the alternates, defendant's sixth peremptory.

MR. SHEELA: We're satisfied, your honor.

THE COURT: Draw -- what do we need; three?

THE CLERK: Nora Maxwell, M-A-X-W-E-L-L.

Donald Alexson, A-L-E-X-S-O-N.

Mark Smith, S-M-I-T-H.

THE COURT: Mr. Sheela.

MR. SHEELA: Thank you, your honor.

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[51 RT 6460]

penalty, I would have exercised those.

THE COURT: The record will so reflect.

MR. WOODWARD: I guess while we're in a record-making mood, perhaps we can note that counsel's excusal of Mrs. Mares-Clark was of a lady that I perceived as being Hispanic.

THE COURT: She is.

MS. FRANCO: In her questionnaire, she stated she was Spanish.

MR. WOODWARD: I thought that was the same thing, Fancier.

THE COURT: I think counsel would agree that she is Hispanic in origin.

MR. WOODWARD: I would also note that we have an alternate who is black.

MR. SHEELA: And one that's Hispanic.

THE COURT: And one that is Hispanic.

MR. WOODWARD: Yes.

THE COURT: The record will so reflect.

MR. SHEELA: Does that mean you want more peremptory challenges to excuse them?

MR. WOODWARD: No. I like blacks and Hispanics.

MR. SHEELA: I thought I'd take a cheap shot.

THE COURT: Off the record.

(Discussion off the record)

THE COURT: While everyone is present, I read this; and I note that Miss Bondurant is a member of the jury. I read it before, and this was concerning her husband's application in Imperial County, should he get a job, and counsel is aware of

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San Diego County Superior Court
[Title Omitted in Printing]

[111 RT 13607]

destroyed the juror questionnaires.

Earlier you had asked at our last meeting, you had suggested that I speak with the clerk of this court to find out what the procedure was. That is really sort of not sufficient for our purposes on appeal in this case, and it especially wouldn't serve us because we are missing even more questionnaires than are missing in Renaldo Ayala's case. So, whether or not the court had a procedure at that time, something wasn't followed somewhere. So, we would like to be able to get some kind of statement from Judge Jones as to what he recalls having occurred.

And let's see, then there were four juror questionnaires which we found in trial counsel's files. I have spoken to the attorney general about this, and he accurately states he cannot stipulate to something that he doesn't know the truth of. In other words, I have got copies of pieces of paper in a file that are purportedly juror questionnaires, but of course we don't know whether these are copies of copies or what they are. In addition to that, there was a court order apparently that they be destroyed, and in addition to that -- or that they be handed into the court anyway. And in addition to that, I think the new Code of Civil Procedure 237 that became effective this year, may -- that that would have to be considered if we wanted to put these questionnaires into the record. I don't know how your honor wants to deal with it. Appellant has felt compelled to tell the court of the existence of these because we believe that it was inadvertently that these were not destroyed or handed in at the time they should

[111 RT 13608]

have been handed in.

THE COURT: My feeling is is that if they are not capable of a proper foundation, they should not be part of the record.

MS. CALDWELL: And as to what your honor wishes to do with these, I don't know whether you want us to hand them in to you or how you want to deal with it, but I do offer it to the court because --

THE COURT: I have no idea, frankly.

Do you have any suggestion?

MR. MOTLEY: Your honor, perhaps they can be sealed and provided --

THE COURT: We can do that if you like. We will take them and put them in a sealed envelope, and put them in the balance of the file.

MR. MOTLEY: To that extent, assuming counsel finds some issue on appeal that might -- to which they might be relevant, at that time she could move the Supreme Court to add them to the record.

THE COURT: Okay.

MS. CALDWELL: Well, we do feel the juror questionnaires are relevant to an issue on appeal. I do want to tell you that that doesn't go just for these, it goes for all of the juror questionnaires. But I -- these are the originals. I made copies in anticipation that counsel would like to have copies of them.

THE COURT: Why don't you give us the original and the copies.

[111 RT 13609]

Lynn, counsel is going to hand you some questionnaires and copies. They're to be sealed in a separate envelope and made part of the file.

MS. CALDWELL: I should list who they are for. Mark Smith, Jay Fountain, Karen Lee, and Patricia Carpenter.

THE COURT: Were any of those people ultimately jurors on the case?

MS. CALDWELL: Mr. Smith was an alternate juror for a I think a day or two, and then was replaced as an alternate.

THE COURT: And the balance of the named individuals?

MS. CALDWELL: No, they were not. And the only other questionnaires that are in trial counsel's files are the ones that are in the record as now stands augmented, the actual jurors --

THE COURT: Okay.

MS. CALDWELL: --that sat on the case, and the alternates.

THE COURT: If you give the originals and the copies to the clerk.

MS. CALDWELL: They are marked.

THE COURT: They will be sealed.

MS. CALDWELL: And finally as to our request that we have -- that we prepare a stipulation that all off the record discussions and unreported bench conferences involving nonsubstantive matters, we are withdrawing that request.

THE COURT: Okay. Anything that the attorney general needs to comment on at this point?

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San Diego County Superior Court
[Title Omitted in Printing]

[34 CT 7014]

Filed June 27, 1996

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
v.
HECTOR JUAN AYALA
Defendant and Appellant.

San Diego Superior Court No. CR 78077
(Supreme Court No. S013188)

STATEMENT IN SETTLEMENT OF THE RECORD

The following is a true and correct statement in settlement of the record:

1. Pursuant to the court's order, the juror questionnaires of those jurors who were excused for any reason were returned to the court by both the prosecution and defense. Neither side was to retain copies of those questionnaires. The questionnaires were then placed in the Exhibit Room.

Dated: June 19, 1996

/S/-Napoleon A. Jones, Jr.
Napoleon A. Jones, Jr.
Judge of the United States District Court for the Southern District of California
(formerly Judge of the Superior Court of San Diego County)

[34 CT 7018]

Filed June 24, 1996

Superior Court of California
County of San Diego
Clerk's Certificate

Case Name: People of the State of California vs. HECTOR AYALA

I, KENNETH E. MARTONE, Clerk of the Superior Court,

DO CERTIFY:

THAT, I have made a diligent search, of the exhibit room, for the jury questionnaires of the unseated panel for the trial of Hector Ayala.

THAT, the requested jury questionnaires are unable to be located.

THAT, the exhibit room contains for Hector Ayala, only the marked exhibits which do not include the jury questionnaires for the unseated panel, and 10 boxes of reporter's transcripts plus two boxes of reporters notes that were not marked as exhibits but were mearly stored in the exhibit room.

I certify under penalty of perjury under the laws of the State of California that the forgoing is true and correct.

Witness my hand and the Seal of said Court.

KENNETH E. MARTONE
CLERK OF THE SUPERIOR COURT
By /S/-Linda B. Saint
Date: June 24, 1996

Filed February 17, 2009

United States District Court
Southern District of California
Hector Juan Ayala
v.
Robert L. Ayers, Warden of the California State Prison at San Quentin
Case Number: 02cv1322-IEG(PCL)
JUDGMENT IN A CIVIL CASE

[ ] Jury Verdict. This action came before the Court for a trial by jury The issues have been tried and the jury has rendered its verdict.

[x] Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED
that the Court DENIES Petitioner's Motion for Summary Adjudication on Claim 26. Respondent's Motion for Summary Adjudication on Claim 26 is GRANTED. Respondent's Motion to Dismiss Claim 26 pursuant to Teague v. Lane is GRANTED. The Third Amended Petition for Writ of Habeas Corpus is DENIED as to all claims. Judgment entered in favor of Respondent. Case is closed

February 17, 2009
Date
W. Samuel Hamrick, Jr.
Clerk
J. Haslam
(By) Deputy Clerk
ENTERED ON February 17, 2009

PETITIONER'S BRIEF

No. 13-1428

In The
Supreme Court of the United States

KEVIN CHAPPELL, WARDEN,

Petitioner,

v.

HECTOR AYALA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR PETITIONER

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CAPITAL CASE
QUESTIONS PRESENTED

1. Whether a state court's rejection of a claim of federal constitutional error on the ground that any error, if one occurred, was harmless beyond a reasonable doubt is an "adjudicat[ion] on the merits" within the meaning of 28 U.S.C. § 2254(d), so that a federal court may set aside the resulting final state conviction only if the defendant can satisfy the restrictive standards imposed by that provision.

2. Whether the court of appeals properly applied the standard articulated in *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993).

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OPINIONS BELOW

The final opinion of the court of appeals (Pet. App. 1a-121a) is reported at 756 F.3d 656, together with an opinion dissenting from the denial of rehearing en banc (Pet. App. 172a-188a). Withdrawn versions of that court's opinion are reported at 730 F.3d 831 and 693 F.3d 945. The opinion of the district court denying federal habeas relief on the relevant claim (Pet. App. 122a-171a) is unpublished. The opinion of the California Supreme Court on direct appeal in the underlying state case (Pet. App. 189a-261a) is reported at 24 Cal. 4th 243.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 2013. *See* Pet. App. 1a. A petition for rehearing en banc was denied on February 25, 2014. Pet. App. 172a. The petition for a writ of certiorari was filed on May 27, 2014 (the 26th being a court holiday) and granted on October 20, 2014. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 2254 of Title 28 of the United States Code provides in pertinent part:

> [(b)](2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

* * *

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT

1. In 1989, respondent Hector Ayala was tried for the execution-style murders of three men during an attempted robbery. *See* Pet. App. 2a, 189a-196a. Juan Meza testified that Ayala, Ayala's brother, and Meza had planned the robbery about a month before the murders, targeting an automobile body shop that they suspected was a drug stash house. *Id.* at 191a-192a. The plan was to tie up the shop's workers, then wait for a drug shipment to be brought by one worker's wife. *Id.* at 192a. The one surviving victim testified that around dusk on the night of the robbery, Ayala and his accomplices tied up the workers at gun

point, with Ayala asking one of them "Didn't you know you had to go through us?" *Id.* at 192a-193a. The robbers demanded $10,000; but when one worker offered to get money from his truck, Ayala told the worker he preferred to "blow you away." *Id.* at 193a. One victim escaped, but was shot and wounded as he fled. *Id.* at 194a. As he lay injured, he heard more shots. *Id.* When police arrived at the scene, they found the bodies of the three other captives. *Id.* at 194a-195a. Each had been shot twice in the head. *Id.* at 191a.

Jury selection lasted three months. Pet. App. 3a. In three motions pursuant to *People* v. *Wheeler*, 22 Cal. 3d 258 (1978) – California's equivalent to *Batson* v. *Kentucky*, 476 U.S. 79 (1986) – defense counsel objected to the prosecutor's use of seven peremptory challenges to exclude minority jurors. Pet. App. 3a-4a & n.1.[1] When the court asked the prosecutor to explain his reasons for the challenges, the prosecutor said he would prefer to provide them ex parte, so as not to divulge matters of trial strategy. *Id.* at 196a-197a. Although the defense objected, the trial court permitted the prosecutor to provide his explanations on the record, but outside the presence of Ayala and his attorney. *Id.* at 197a. Based on those colloquies, the trial court concluded that the prosecutor had not made his challenges on the basis of race. *Id.*

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[1] *See People* v. *Banks*, 59 Cal. 4th 1113, 1145 (2013) (*Wheeler* objection preserves a *Batson* claim).

The jury convicted Ayala of three counts of first-degree murder, one count of attempted murder, one count of robbery, and three counts of attempted robbery. Pet. App. 189a-190a. It found two special circumstances – multiple murder and murder in the attempted commission of robbery – and returned a verdict of death as to each count of murder. *Id.* The trial court entered judgment in accordance with those verdicts. *Id.* at 190a.

2. The California Supreme Court affirmed. Pet. App. 189a-261a. Among other things, Ayala challenged the trial court's use of ex parte hearings to receive the prosecutor's explanations for his peremptory challenges. *See id.* at 196a-212a. In describing the legal framework applicable to that claim, the California Supreme Court cited both *Batson* and *Wheeler*. *E.g.*, *id.* at 196a-198a. It observed that, apart from the general framework established by *Batson*, "no particular procedures are constitutionally required," and specifically noted this Court's statement that it "'remain[ed] for the trial courts to develop rules'" for the appropriate handling of *Batson* challenges "'without unnecessary disruption of the jury selection process.'" *Id.* at 198a (quoting *Powers* v. *Ohio*, 499 U.S. 400, 416 (1991)).

a. The court held that, "as a matter of state law," the trial court erred by excluding the defense from the prosecutor's *Wheeler/Batson* proffers where "no matters of trial strategy were revealed." *Id.* at 200a; *see id.* at 199a-203a. Recognizing its obligation "to scrutinize [the record] closely," *id.* at 207a n.3, the

court then conducted an extensive, independent review to determine whether the error it had identified was prejudicial, *id.* at 203a-212a; *see* pp. 6-10, *infra*. In the end, it concluded "that the error was harmless under state law (*People* v. *Watson*, [46 Cal. 2d 818, 836 (1956)]), and that, if federal error occurred, it, too, was harmless beyond a reasonable doubt (*Chapman* v. *California*, [386 U.S. 18, 24 (1967)]) as a matter of federal law." Pet. App. 203a.

The court reasoned that the existing record sufficed to conclude that the prosecutor did not engage in racial discrimination. Pet. App. 207a. "On these facts," the court explained, "we are confident that the prosecutor was not violating *Wheeler*, and that defense counsel's presence could not have affected the outcome of the *Wheeler* hearings." *Id.* The court also expressed confidence in the evaluation of the situation by the trial court, whose "rulings in the ex parte hearing indisputably reflect[ed] both its familiarity with the record of voir dire of the challenged prospective jurors and its critical assessment of the prosecutor's proffered justifications." *Id.* at 208a. Noting that it had "now reviewed the records of two cases [Ayala's and his brother's] tried by this superior court judge in respect of the same crimes," the court observed that "[i]n both, the trial judge showed himself to be in command of the law and the facts. He was diligent, prepared, knowledgeable, and

engaged in the proceedings, including those relating to defendant's *Wheeler* motion." *Id.* at 210a.[2]

The court acknowledged the "possibility . in the abstract" that participation by defense counsel in a prosecution *Batson* proffer could help develop reasons to doubt the prosecutor's explanations, but it concluded that there was "nothing [to] suggest[ ] that something similar occurred here." Pet. App. 209a. It declined to "reverse the judgment on the basis of speculation regarding theoretical possibilities of th[at] type." *Id.* In this case, the record was "well developed," and "the trial court's remarks constitute[d] a valuable assessment of the prosecutor's justifications." *Id.* at 210a. Ultimately, the Supreme Court was "confident that defense counsel could not have argued anything substantial that would have changed the [trial] court's rulings." *Id.* at 211a.

b. The Supreme Court reached these conclusions only after careful consideration of the record as to each venire member whose strike was challenged. As to venire member Olanders D., for example, the prosecutor had noted that D.'s jury questionnaire said that he opposed capital punishment. Pet. App. 203a. Although D. indicated his views had changed over the

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[2] The state trials were conducted before Judge Napoleon Jones, Jr. Judge Jones had been appointed to the state municipal court in 1977 and to the superior court in 1982. In 1994, he was appointed to the U.S. District Court for the Southern District of California. *See* Federal Judicial Center, Biographical Directory of Federal Judges, *available at* http://www.fjc.gov.

years, the prosecutor believed D. was not being entirely responsive to the questions posed by either party, and that he would not "'fit in'" on the jury. *Id.* The trial court disagreed on the last point, believing D. might well get along with other jurors, but it found the other proffered reasons accurate and supported by the record. *Id.* at 203a-204a.

Considering Galileo S., the court noted the prosecutor's explanation that S.'s answers on attitudes toward the death penalty revealed that he was "'a nonconformist person who has had numerous run-ins with the law.'" Pet. App. 204a. The prosecutor pointed out that government records indicated three or four arrests beyond those that S. had admitted. *Id.* The prosecutor summarized: "'[H]is attitude is such that I think it would create alienation and hostility on the part of the other jurors.'" *Id.* The trial court agreed, observing that S. exhibited a "'paranoia . concerning the justice system.'" *Id.* The Supreme Court's independent review of the record "tend[ed] to confirm some of these observations." *Id.* n.1. The court noted that S. "referred to the average juror as 'Joe Six-Pack,'" "stated that '[m]ost people bother me,'" and exhibited a "somewhat flippant attitude in responding to various questions during general voir dire." *Id.*

Regarding prospective juror Barbara S., the Supreme Court discussed the prosecutor's observations that S.'s responses to questions were extremely slow, causing the prosecutor to suspect she was under the influence of drugs. Pet. App. 204a. She had "'an empty look in her eyes,'" slow responses, and "'a lack

of really being totally in tune with what was going on.'" *Id.* The prosecutor believed that S.'s answers did not make sense, that she lacked the ability to communicate effectively during the questioning process, and that she appeared angry. *Id.* at 204a-205a. The Supreme Court noted that the trial court interpreted S.'s demeanor as reflecting nervousness rather than hostility. *Id.* at 205a. Otherwise, however, the trial court "'certainly [could not] quarrel'" with the prosecutor's impressions or with his decision to challenge S. *Id.*

As to Gerardo O., the Supreme Court noted the prosecutor's explanation that O. had difficulty in reading, writing, and understanding English, that his dress and behavior were not like the other prospective jurors, and that he appeared to be "aloof" from other prospective jurors. Pet. App. 205a. The prosecutor also was concerned about O.'s inability to express any opinion about the death penalty. *Id.* The trial court agreed that the record supported the prosecutor's assessment, and the Supreme Court's "own review of the record tend[ed] to confirm [the prosecutor's] observations" as well. *Id.* at 205a & n.2.

Regarding prospective juror George S., the Supreme Court noted that the prosecutor believed S. was Greek, not Hispanic. Pet. App. 205a-206a. The prosecutor felt "'extremely uneasy'" about the fact that S. was the sole "holdout" on a prior jury, *id.* at 205a, and about his voir dire responses concerning the death penalty, *id.* at 206a (discussing responses under *Hovey* v. *Superior Court*, 28 Cal. 3d 1 (1980)).

The prosecutor was also concerned that S.'s application to be a police officer had been rejected, which the prosecutor feared might have been for psychological reasons. *Id.* at 206a. The trial court confirmed that each of these observations was accurate. *Id.*

As to Luis M., the Supreme Court noted the prosecutor's concerns that M. was hesitant about the death penalty, had asked about the defendant in his neighborhood, and had personally investigated the case. Pet. App. 206a. The trial court agreed that the prosecutor's peremptory challenge was proper. *Id.*

Finally, regarding prospective juror Robert M., the Supreme Court observed that the prosecutor had initially passed on challenges, leaving M. on the panel. Pet. App. 206a. Ultimately, the prosecutor decided to challenge M. because he doubted M. could actually impose the death penalty. *Id.* The trial court agreed that, although M.'s questionnaire indicated he was supportive of the death penalty, his answers were equivocal as to whether he could actually impose it. *Id.* at 206a-207a. The trial court found this to be a permissible basis upon which to exercise a peremptory challenge. *Id.* at 207a.

The California Supreme Court concluded that the trial court's rulings "reflect[ed] both its familiarity with the record of voir dire of the challenged prospective jurors and its critical assessment of the prosecutor's proffered justifications." Pet. App. 207a. To the extent those rulings endorsed the prosecutor's characterizations of prospective jurors and their responses, they

also supported the trial judge's "implicit conclusion that the prosecutor did not fabricate his justifications and that they were grounded in fact." *Id.* at 208a.

Chief Justice George, joined by Justice Kennard, dissented. Pet. App. 245a-261a. In their view, a *Batson* proffer was a "'critical stage'" of a criminal proceeding; exclusion of defense counsel from such a proffer required that prejudice be presumed; and the presumption could be overcome by "'[o]nly the most compelling showing.'" *Id.* at 253a (emphasis omitted) (quoting *People* v. *Knighten*, 105 Cal. App. 3d 128, 132-33 (1980)). The dissent reasoned that the presumption could not be overcome in this case because defense counsel's exclusion from the colloquies at which the prosecution proffered non-discriminatory reasons for its strikes had resulted in a potentially incomplete record. *Id.* at 259a-260a.

3. In 2002, Ayala filed a federal petition for habeas corpus, including a claim that the trial court's exclusion of the defense from the proffers during which the prosecutor explained his reasons for challenging the seven prospective jurors violated his federal constitutional rights. Pet. App. 124a, 130a-133a. The district court denied relief.

The district court first held that it was not clearly established at the time Ayala's conviction became final whether a defendant had a federal constitutional right to have counsel participate in a *Batson* hearing. *See* Pet. App. 132a. The court thus concluded that relief based on some of Ayala's arguments would require

applying a new rule of federal criminal procedure, which would be barred by *Teague* v. *Lane*, 489 U.S. 288 (1989). *See* Pet. App. 127a-132a.

Alternatively, the district court held that Ayala could not satisfy an exception to the relitigation bar imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254(d).[3] *See* Pet. App. 133a-154a. As particularly relevant here, the court noted that in *Batson* this Court specifically left it to the lower courts to "'formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges.'" Pet. App. 143a (quoting *Batson*, 476 U.S. at 99 & n.24). It looked to decisions from the Sixth and Seventh Circuits, holding that a trial court does not err in excluding the defense from a prosecutor's explanation for exercising peremptory challenges. *Id.* (citing *United States* v. *Tucker*, 836 F.2d 334, 337-40 (7th Cir. 1988), and *United States* v. *Davis*, 809 F.2d 1194, 1201-02 (6th Cir. 1987)). In light of these authorities, the district court "doubt[ed] whether the trial court's procedure was constitutionally defective as a matter of clearly established Federal law." Pet. App. 145a.

In any event, the district court concluded that the state court's determination of harmless error was neither "'contrary to [n]or an unreasonable application of clearly established law.'" Pet. App. 145a (alteration in original). Based on its own review of the

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[3] *See* Pub. L. No. 104-132 § 104, 110 Stat. 1214 (1996).

record, it agreed with the state court that "the prosecutor's proffered non-discriminatory reasons for exercising each of the peremptory challenges [were] amply supported by the record." *Id.* at 148a.

4. A divided panel of the Ninth Circuit reversed and remanded, instructing the district court to grant federal habeas relief. Pet. App. 1a-121a (final amended opinions).

a. At the outset of its analysis, *see* Pet. App. 9a, the court acknowledged that Ayala's habeas petition was subject to AEDPA, which requires deference to a state court's adjudication of the merits of a claim unless the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law" as determined by this Court or "was based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d). The court recognized this Court's decision in *Harrington* v. *Richter*, 131 S. Ct. 770 (2011) (*Richter*), holding that "'[w]hen a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary.'" Pet. App. 13a (quoting *Richter*, 131 S. Ct. at 784). It likewise acknowledged this Court's decision in *Johnson* v. *Williams*, 133 S. Ct. 1088 (2013) (*Tara Williams*), holding that "'[w]hen a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits – but that

presumption can in some limited circumstances be rebutted.'" *Id.* at 14a (quoting *Tara Williams*, 133 S. Ct. at 1096).

The court concluded, however, that the *Tara Williams* presumption did not apply to Ayala's *Batson*-related claim; and that, even if it did, it had been rebutted by the state court's opinion. Pet. App. 14a-15a. It reasoned that the California Supreme Court's opinion could support only two interpretations. One was that the court must have silently found federal constitutional error, because it held there was state error and its decision included discussion of cases concluding that there had been federal error. *Id.* at 14a-17a. Alternatively, the state court might have decided that there was nothing to be gained from reaching the federal constitutional issue, because it had already decided that any error was harmless under both the state and federal standards. *Id.* at 17a-21a. In that situation, the Ninth Circuit concluded, the presumption that the state court had adjudicated Ayala's federal claim "on the merits" would be rebutted. *Id.* at 18a.

b. Proceeding to review Ayala's claim de novo, the court of appeals held that excluding the defense from the prosecutor's *Batson* proffer was both unconstitutional and prejudicial. Pet. App. 23a-53a.

As to error, the court held that the question was controlled by its own prior precedent dealing with federal proceedings. Pet. App. 24a (citing *United States* v. *Thompson*, 827 F.2d 1254 (9th Cir. 1987)).

In assessing prejudice the court likewise proceeded de novo, based on its reading of *Fry* v. *Pliler*, 551 U.S. 112 (2007). Pet. App. 31a-32a & n.13. The court therefore "'appl[ied] the *Brecht* [v. *Abrahamson*, 507 U.S. 619 (1993)], test without regard for the state court's harmlessness determination.'" Pet. App. 31a-32a. The court undertook its own juror-by-juror review of the record, *see id.* at 38a-51a, and ultimately concluded that "constitutional error on the part of the state likely prevented Ayala from showing that the prosecution utilized its peremptory challenges in a racially discriminatory manner," *id.* at 70a-71a. Perceiving "substantial reason to question the motivation of the prosecution in engaging in its peremptory challenges," *id.* at 38a, the court concluded it was "probable that the state's errors precluded Ayala from turning what is a very plausible *Batson* claim – the challenge to the prosecution's strikes of all minority jurors – into a winning one" by preventing defense counsel from identifying where the prosecutor's reasons might have been pretextual and from making a better record of related facts or arguments to support Ayala's claim, *id.* at 35a.

c. Judge Callahan dissented. Pet. App. 71a-121a. Like the district court, she concluded that Ayala's claim was barred under *Teague* v. *Lane*. *Id.* at 72a-80a. As to review under AEDPA, she reasoned that the California Supreme Court's judgment was entitled to full deference under § 2254(d), because that court had "addressed Ayala's federal claim in determining that whatever federal error occurred, it

was harmless as a matter of federal law." *Id.* at 80a-81a. In her view, the majority improperly "evad[ed] giving the [state court's] opinion the deference demanded by AEDPA and the United States Supreme Court." *Id.* at 82a. Applying deferential review, Judge Callahan would have declined to set aside the state court's judgment. *Id.* at 90a-121a; *see, e.g.*, *id.* at 120a ("[u]ltimately, however, this case turns on the reasonableness of the California Supreme Court's 2000 opinion" concerning harmlessness).

d. The court of appeals denied the State's petition for rehearing en banc. Pet. App. 172a. Eight judges dissented, joining an opinion by Judge Ikuta. *Id.* at 172a-188a.

Judge Ikuta would have read the California Supreme Court's opinion as resolving Ayala's federal constitutional claim against him, because the opinion discussed this Court's statements leaving it to trial courts to develop specific *Batson* procedures. Pet. App. 175a. In any event, she reasoned that deference would apply even if the state court declined to determine whether there was a violation. *Id.* at 181a-183a. The Supreme Court, she explained, "has never suggested that when a state court rejects a petitioner's claim because any potential error was harmless, we can review the claim de novo because that claim was not fully adjudicated on the merits" for purposes of AEDPA. *Id.* at 181a. On the contrary, she reasoned, because a conclusion that any error is harmless results in a denial of relief on substantive, not procedural, grounds, a state court's decision based on

harmlessness is an adjudication on the merits under § 2254(d). *Id.* at 182a-183a.

Judge Ikuta also concluded that the panel's "exceptionally non-deferential" application of the *Brecht* prejudice standard contradicted this Court's decision in *Fry* v. *Pliler*, 551 U.S. 112 (2007). Pet. App. 184a-185a. Given *Fry*'s reasoning that "the *Brecht* standard is more deferential to state courts than an AEDPA/*Chapman* analysis," she reasoned, there could be no prejudice under *Brecht* where a state court's harmless-error determination under *Chapman* was not unreasonable. *Id.* at 185a-186a. In her view, the California Supreme Court's "meticulous review" concluding that any *Batson* error in this case was harmless beyond a reasonable doubt was not an unreasonable application of *Chapman*. *Id.* at 186a. Accordingly, the panel should not have "engage[d] in not just de novo legal analysis, but de novo review of the record that piles speculation upon speculation, instead of giving due deference to the finder of fact." *Id.*

SUMMARY OF ARGUMENT

In 28 U.S.C. § 2254(d), Congress sharply limited federal habeas review of "any claim that was adjudicated on the merits in State court proceedings." A state court's denial of relief on a given claim based on a determination that any violation of the defendant's rights was harmless under the circumstances of the case is an "adjudicat[ion] on the merits" within the meaning of that provision. It disposes of the claim as

a matter of substantive right and wrong, not on some technical or procedural ground. That conclusion is the only one consistent with the statute's text, structure, and purpose, and with this Court's explanation of how federal courts must approach habeas review when a state court has not explained its rejection of a given claim.

Because the California Supreme Court's rejection of Ayala's claim on harmlessness grounds was an adjudication on the merits, a federal court may not set aside Ayala's state conviction based on that claim unless the state court's *decision* – that is, its denial of relief on the particular claim – was contrary to, or involved an unreasonable application of, a rule of federal law clearly established by this Court. That, in turn, could be the case only if this Court's precedent clearly established that the trial court had committed federal error. But this Court has expressly declined to specify particular procedures for implementing *Batson*, and lower courts have divided over whether it is generally impermissible to exclude the defense from colloquies in which a prosecutor proffers non-discriminatory reasons for peremptory strikes. Under these circumstances, AEDPA does not authorize federal habeas relief on Ayala's claim.

Similarly, a federal court applying AEDPA has no basis for concluding that any error in excluding Ayala's counsel from *Batson* proffers warrants relief under the "'actual prejudice'" standard of *Brecht* v. *Abrahamson*, 507 U.S. 619, 637 (1993). This Court has explained, in the AEDPA context, that the *Brecht*

standard is *more* restrictive than AEDPA's statutory requirement of deference to a state court's determination that error was harmless beyond a reasonable doubt under *Chapman* v. *California*, 386 U.S. 18 (1967). Here, the California Supreme Court's careful analysis under *Chapman* was neither contrary to nor an unreasonable application of this Court's precedents. *A fortiori*, there is no basis for relief under *Brecht*. The court of appeals erred both in believing that its own analysis of harm could properly proceed "'without regard for'" that of the state court, Pet. App. 31a-32a, and in the way it performed that analysis – speculating about hypothetically possible harm, rather than reviewing the record for evidence of the sort of "actual prejudice" that could justify setting aside a state conviction.

ARGUMENT

I. The California Supreme Court's Decision Rejecting Ayala's Claim Was an Adjudication on the Merits

Where a federal claim has been "adjudicated on the merits" in state proceedings, a federal court may not grant habeas relief:

> unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

These AEDPA standards are intentionally "difficult to meet." *Harrington* v. *Richter*, 131 S. Ct. 770, 786 (2011). They were designed "to limit the scope of federal intrusion into state criminal adjudications and to safeguard the States' interest in the integrity of their criminal and collateral proceedings." *Williams* v. *Taylor*, 529 U.S. 420, 436 (2000) (*Michael Williams*). They are "'highly deferential,'" and "'demand[ ] that state-court decisions be given the benefit of the doubt.'" *Cullen* v. *Pinholster*, 131 S. Ct. 1388, 1398 (2011). They promote finality, comity, and federalism, by giving the greatest possible effect to state convictions. *Woodford* v. *Garceau*, 538 U.S. 202, 206 (2003).

The California Supreme Court rejected the federal claim at issue here on the ground that any error in excluding defense counsel from the prosecution's *Batson* proffers at the outset of Ayala's trial was harmless beyond a reasonable doubt.[4] The court of appeals treated that holding as not an "adjudicat[ion]

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[4] At the same time, the court made clear that as a matter of *state* law it is normally improper to permit ex parte presentation of such proffers. Pet. App. 200a. There is, accordingly, no question concerning the standard practice in this regard in California trials.

on the merits" for purposes of AEDPA; decided for itself that the state court committed federal constitutional error when it heard and evaluated the prosecutor's nondiscriminatory explanations outside the presence of the defense; and then concluded that the error was prejudicial based on a speculative analysis of potential harm, giving no regard to the state court's contrary reasoning and result. That approach cannot be reconciled with the text, structure, or purposes of AEDPA.

A. Textually, Denial of Relief Based on Harmlessness Is an Adjudication "On the Merits"

In construing § 2254(d), the words "adjudicated on the merits," like other words in the statute, must be given "their ordinary, contemporary, common meaning, absent an indication Congress intended them to bear some different import." *Michael Williams*, 529 U.S. at 431 (internal quotation marks omitted). To "[a]djudicate" is "to rule upon judicially," *Black's Law Dictionary* 50 (10th ed. 2014), or "to settle finally (the rights and duties of the parties to a court case) on the merits of issues raised: enter on the records of a court (a final judgment, order, or decree of sentence)," *Webster's Third New International Dictionary* 27 (1976). And "the word 'merits'" in § 2254(d) means "'[t]he intrinsic rights and wrongs of a case as determined by matters of substance, in distinction from matters of form.'" *Tara Williams*, 133 S. Ct. at 1097 (quoting *Webster's New International*

Dictionary 1540 (2d ed. 1954) (emphasis omitted)). Thus, a judgment is rendered "on the merits" for purposes of § 2254(d) where it is "'delivered after the court . . heard and evaluated the evidence and the parties' substantive arguments.'" *Id.* at 1097 (quoting *Black's Law Dictionary* 1199 (9th ed. 2009)) (ellipsis in *Tara Williams*; emphasis omitted).

In contrast, non-merits adjudications are based on matters extraneous to the claim, "'such as the competence of the tribunal or the like,'" "'procedural details,'" or "'technicalities.'" *Tara Williams*, 133 S. Ct. at 1097. "An 'adjudication on the merits' is 'best understood by stating what it is not; it is not a resolution of a claim on procedural grounds.'" *Id.* at 1100 (Scalia, J., concurring in the judgment). *Cf. Gonzalez* v. *Crosby*, 545 U.S. 524, 532 & n.4 (2005) (distinguishing, in a related context, between a determination "that there exist or do not exist grounds entitling a petitioner to habeas corpus relief" and "a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar").

When a state court rejects a claim on the ground that any error, if one occurred, caused no cognizable harm, it adjudicates the claim "on the merits."[5] Such

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[5] *See, e.g.*, *Littlejohn* v. *Trammell*, 704 F.3d 817, 850 n.17 (10th Cir. 2013) ("Where a state court assumes a constitutional violation in order to address whether the defendant was actually harmed by the violation, as here, the state court takes the claim on the merits; it just disposes of it on alternative *merits*-based reasoning."); *Brown* v. *Luebbers*, 371 F.3d 458, 462-63 (8th Cir.

(Continued on following page)

a determination is not a holding that the court is jurisdictionally powerless to rule, or a denial of relief based on "'procedural details'" such as failure to preserve the claim or to assert it before the running of a statute of limitations, or a denial based on "'technicalities'" such as formal or service requirements. *Cf. Tara Williams*, 133 S. Ct. at 1097. On the contrary, a harmless-error determination addresses the heart of a defendant's substantive entitlement to relief.

As this Court has "stressed on more than one occasion, the Constitution entitles a criminal defendant to a fair trial, not a perfect one." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986). Indeed, the determination that an actual or possible error does not entitle the defendant to relief because it did not affect the outcome of a proceeding is the antithesis of a technical or procedural analysis. Denying relief for harmless errors allows courts to "focus[] on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *Id.* The question of harmlessness thus goes directly to whether it is substantively appropriate for a court to grant relief. It embodies the critical principle that "judgments shall not be reversed for 'errors or defects which do not affect the substantial rights of the parties.'" *Chapman* v. *California*, 386 U.S. 18, 22 (1967).

2004) (en banc); *Whitmore* v. *Kemna*, 213 F.3d 431, 432-33 (8th Cir. 2000).

Here, the California Supreme Court's detailed opinion demonstrates that the court "heard and *evaluated* the evidence and the parties' substantive arguments." *Tara Williams*, 133 S. Ct. at 1097. It concluded that Ayala was not entitled to relief, even if it was constitutional error to exclude his counsel from the prosecutor's *Batson* proffers, because in this case there was no reasonable basis for questioning the trial court's determination that the prosecutor did not make his challenges on the basis of race. *See* Pet. App. 203a, 207a-209a. That ruling was based on "'the intrinsic rights and wrongs'" of Ayala's case, *Tara Williams*, 133 S. Ct. at 1097 (emphasis omitted), and is an "adjudicat[ion] on the merits" under § 2254(d).

B. The Structure and Purpose of AEDPA Review Confirm that a Denial of Relief Based on Harmlessness Is an Adjudication on the Merits

This construction of the statutory text is confirmed by the structure and purpose of the deferential federal habeas review required by AEDPA, as repeatedly explicated by this Court.

1. To begin with, the Court has already treated a state judgment based on a determination of harmlessness as an AEDPA adjudication on the merits. In *Mitchell* v. *Esparza*, 540 U.S. 12 (2003), the state court denied relief on the ground that "any error . . was harmless." *Id.* at 15. In reversing a grant of federal habeas relief, this Court made clear that

federal courts could review that determination only within the limits imposed by § 2254(d). Thus, the Court first held that no clearly established federal law precluded the use of harmless-error analysis for the claim at issue. *Id.* at 17. It then asked whether the state court's determination was "an 'unreasonable *application* of clearly established Federal law.'" *Id.* at 17 (quoting § 2254(d)(1)) (emphasis in *Mitchell*). In that regard, the question was not whether "the state court simply erred in concluding that the State's errors were harmless; rather, habeas relief [would be] appropriate only if the [state court] applied harmless-error review in an 'objectively unreasonable' manner." *Id.* at 18 (citing AEDPA cases).

As this Court later explained, *Mitchell* "held that, when a state court determines that a constitutional violation is harmless, a federal court may not award habeas relief under § 2254 unless *the harmlessness determination itself* was unreasonable." *Fry* v. *Pliler*, 551 U.S. 112, 119 (2007); *see also* pp. 39-42, *infra* (discussing *Mitchell* and *Fry*). The necessary premise for that holding is that a federal claim rejected by a state court on harmlessness grounds has been "adjudicated on the merits" within the meaning of § 2254(d), thus triggering AEDPA's limitations on federal habeas review.

2. That conclusion is consistent with the way the term "on the merits" is used elsewhere in § 2254.

Section 2254(b) specifies that federal courts generally may not *grant* habeas relief on a claim that

the prisoner has not exhausted in state court. Under § 2254(b)(2), however, an application for a writ of habeas corpus may be *denied* "on the merits," despite the prisoner's failure to exhaust. This provision allows habeas courts to dispose of a claim efficiently where it is not a plausible basis for ultimate relief, even if the claim is clearly or possibly unexhausted.[6]

The phrase "on the merits" in this exhaustion provision is sensibly read to include determinations of harmlessness. There is no reason to think that Congress would have denied federal courts the authority to pretermit further consideration of a claim where it can readily be ascertained that any error that might have occurred was harmless. There is likewise no reason to think that Congress would have used the same phrase to mean one thing in § 2254(b)(2) but something else in § 2254(d). *See, e.g.*, *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 826 (1980). The statutory context thus further supports the conclusion that state court judgments based on harmlessness are subject to only deferential review.

3. The same conclusion also follows from this Court's recent decisions in *Richter* and in *Tara Williams*, explaining how federal habeas courts should

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[6] *Cf. Lambrix* v. *Singletary*, 520 U.S. 518, 525 (1997) (comparing § 2254(b)(2) to the rule adopted in *Lambrix*, under which "[j]udicial economy might counsel" deciding an easy and dispositive *Teague* v. *Lane* question rather than a difficult procedural bar issue).

treat state judgments that deny relief on federal claims without explanation.

As *Richter* makes clear, "[s]ection 2254(d) . . . complements the exhaustion requirement and the doctrine of procedural bar to ensure that state proceedings are the central process [in imposing and reviewing state convictions], not just a preliminary step for a later federal habeas proceeding." *Richter*, 131 S. Ct. at 787. *Richter* holds that a state-court decision is presumed to have resolved a federal claim "on the merits," even if there is no declaration by the court to that effect and no "opinion from the state court explaining the state court's reasoning." *Id.* at 784. "When a federal claim has been presented to a state court and the state court has denied relief," federal courts must "presume[ ] that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Id.* at 784-85. Thus, under *Richter*, a presumption that relief has been denied "on the merits" contrasts with a possibility that it might have been denied based on some state procedural default. *See id.*

Tara Williams applies the same presumption to state court opinions that discuss some matters, but not a particular federal claim. "When a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits." 133 S. Ct. at 1096. This is a "strong" presumption, rebuttable only in "limited" and "unusual" circumstances,

such as where evidence clearly indicates that a state court "inadvertently overlooked" a claim. *Id.* at 1096-97.

Here, the California Supreme Court's harmless-error ruling was not procedural, and the court did not overlook Ayala's *Batson* claim. Treating the court's rejection of that claim as anything other than an adjudication "on the merits" would accord less AEDPA deference to a reasoned state decision, noting a federal question and expressly denying relief on harmless-error grounds, than to a state judgment rejecting the same claim without comment. It would, in effect, punish state courts for explaining their reasoning as to claims decided on harmlessness grounds, and inappropriately interfere with state judicial choices about how to decide cases and draft opinions. *See Tara Williams*, 133 S. Ct. at 1095 ("federal courts have no authority to impose mandatory opinion-writing standards on state courts").

Courts of all kinds routinely resolve claims of error based on harmlessness determinations that make it unnecessary to reach underlying legal questions. *See, e.g.*, Pet. App. 183a (Ikuta, J., dissenting from denial of rehearing en banc) ("state courts within our circuit routinely resolve claims of constitutional error on the basis that any potential error was harmless" (citing cases)). Indeed, in an analogous context, this Court has noted that prejudice analysis will sometimes be the most efficient way to dispose of a claim. *Strickland* v. *Washington*, 466 U.S. 668, 697 (1984) ("If it is easier to dispose of an ineffectiveness

claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."). This point is of particular importance to state courts because of the large number of claims often raised, perhaps most notably in capital cases.[7] In light of the common use of harmlessness analysis to resolve particular claims, it seems clear that *Richter* and *Tara Williams* would have taken account of such cases in recognizing a presumption that state courts deny most claims "on the merits."

In addition to being inconsistent with *Richter* and *Tara Williams*, treating express decisions on harmlessness as not adjudications on the merits would also be inconsistent with Congress's purposes in framing AEDPA. It would create a large category of claims which federal habeas courts would review de novo, despite state court decisions considering and rejecting the claims as unable to support relief. *See Richter*, 131 S. Ct. at 787 ("Section 2254(d) is part of the basic structure of federal habeas jurisdiction, designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions."); *Bell* v. *Cone*, 535 U.S. 685, 693 (2002) (AEDPA "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that

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[7] *See In re Sanders*, 21 Cal. 4th 697, 713 n.8 (1999) ("we often see voluminous habeas corpus petitions in capital cases, raising dozens of issues and subclaims, accompanied by hundreds of pages of exhibits").

state-court convictions are given effect to the extent possible under law"). To avoid those inappropriate results, state court decisions based on harmlessness must be recognized as adjudications "on the merits" under AEDPA.

II. A Federal Court May Not Set Aside Ayala's Conviction Because This Court's Precedents Do Not Clearly Establish the Rule He Invokes

Because the California Supreme Court denied relief on Ayala's procedural *Batson* claim "on the merits," the federal courts may not grant habeas relief on that claim unless the state adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" this Court. 28 U.S.C. § 2254(d)(1). Ayala cannot satisfy that standard, because this Court's precedents do not clearly establish the federal constitutional rule that he invokes in seeking relief.

1. As this Court has noted, § 2254(d) "refers only to a 'decision,' which resulted from an 'adjudication.'" *Richter*, 131 S. Ct. at 784. "There is no text in the statute requiring a statement of reasons." *Id.* The distinction is significant here, as in *Richter*, because a "decision" in this context is not the same as an opinion. Rather, the state "decision" that must be contrary to federal law under AEDPA is the *judgment* or *outcome* resulting from the state courts' consideration

of a defendant's federal claim. *See* B. Garner, *Garner's Dictionary of Legal Usage* 250 (3d ed. 2011) ("[I]n the U.S., judges are said to write *opinions* to justify their *decisions* or *judgments*; they do not write *decisions* or *judgments*."). If a "'fairminded jurist[ ]'" (*e.g.*, *Richter*, 131 S. Ct. at 786) applying this Court's holdings could have rejected the federal claim on the facts before the state court, then a state court decision denying relief is not contrary to "clearly established Federal law."

2. This way of analyzing state judgments under AEDPA is the only one consistent with *Richter*. In that case the prisoner raised various claims, including ineffective assistance of counsel, before the California Supreme Court. 131 S. Ct. at 783. That court denied relief without explanation. *Id.* In reviewing the matter on federal habeas, this Court first held that the summary denial was presumptively an adjudication on the merits, entitled to deference under § 2254(d). *Id.* at 784-85. Applying that standard to Richter's claim, the Court made clear that the relevant question under AEDPA was not the state court's reasoning (which that court had not explained), but rather whether there was *any* reasonable basis on which the court could have denied relief. "[A] habeas court must determine what arguments or theories supported or, as here, *could have supported*, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Id.* at 786 (emphasis added). Moreover, because

the ineffective assistance claim had multiple elements, Richter was not entitled to relief unless he could show that clearly established law compelled a finding in his favor on each one:

> [T]he habeas petitioner's burden . . must be met by showing there was no reasonable basis for the state court to deny relief. *This is so whether or not the state court reveals which of the elements in a multipart claim it found insufficient, for § 2254(d) applies when a 'claim,' not a component of one, has been adjudicated.*

Id. at 784 (emphasis added).

Richter's analysis and result reflect a critical feature of AEDPA review. A state court's denial of relief on a federal claim cannot be contrary to, or involve an unreasonable application of, this Court's precedents unless application of those precedents would in fact compel a contrary result. In *Richter*, § 2254(d)(1) did not permit setting aside a state conviction so long as a state court applying this Court's holdings to the facts before it *could* reasonably have concluded that there was either a lack of ineffectiveness *or* a lack of prejudice. Exactly the same principle applies here. A federal court may not overturn Ayala's conviction on the basis of his procedural *Batson* claim unless this Court's precedents compel the conclusion that he is entitled to relief.

3. Under that deferential standard, Ayala cannot establish a right to federal habeas relief.

Whatever the right answer might be if the question were considered de novo, this Court's cases have never clearly established a right to have defense counsel present when a prosecutor proffers non-discriminatory reasons for striking a potential juror. *See, e.g.*, *Glebe* v. *Frost*, 135 S. Ct. 429, 431 (2014) (per curiam) (reversing where court of appeals relied on a rule that "[n]one of [this Court's] cases clearly requires"); *Thaler* v. *Haynes*, 559 U.S. 43, 49 (2010) (per curiam) (reversing where "no decision of this Court clearly establishe[d] the categorical rule on which the Court of Appeals appear[ed] to have relied").

Batson set forth a general three step framework for assessing challenges to peremptory strikes. *See* 476 U.S. at 97-98. The Court expressly declined, however, to prescribe particular procedures for use at trial: "In light of the variety of jury selection practices followed in our state and federal trial courts, we make no attempt to instruct these courts how best to implement our holding today." *Id.* at 99 n.24; *see also Powers* v. *Ohio*, 499 U.S. 400, 416 (1991) ("[i]t remains for the trial courts to develop rules" to implement *Batson*).[8] As the California Supreme Court noted in its discussion of the issue, several federal circuit courts later sustained the use of ex parte procedures under *Batson*. Pet. App. 201a; *see also id.*

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[8] *See also Batson*, 476 U.S. at 102 (White, J., concurring) ("Much litigation will be required to spell out the contours of the Court's equal protection holding today.").

at 198a-199a.[9] Under these circumstances, the rule on which Ayala's claim depends has never been "clearly established" by this Court. *See, e.g.*, *Carey* v. *Musladin*, 549 U.S. 70, 76 (2006) (reversing habeas grant where federal claim was one this Court had "never addressed" – "an open question in our jurisprudence"). Indeed, the decision below implicitly concedes this point. *See* Pet. App. 24a (resolving issue only "[u]nder de novo review," based on circuit precedent); *id.* at 59a (relying on circuit precedent to hold that rule sought by Ayala was not "new" for purposes of *Teague* v. *Lane*, and specifically distinguishing *Teague* from AEDPA on theory that circuit precedent suffices under *Teague*).[10]

4. The court of appeals concluded, to the contrary, that it should review Ayala's federal claim de novo. *E.g.*, Pet. App. 24a. It reasoned in part that this case was one in which the "state court's silence with

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[9] *See United States* v. *Tucker*, 836 F.2d 334, 340 (7th Cir. 1988) (upholding in camera explanation of prosecutor's reasons for strikes: "[w]e disagree with the Ninth Circuit's holding that *Batson* requires adversarial hearings"); *United States* v. *Davis*, 809 F.2d 1194, 1202 (6th Cir. 1987) ("In light of the *Batson* court's respect for judicial flexibility in this area, we must . . disagree with the defendants' contention that their presence at the *in camera* proceeding was constitutionally compelled."); *see also United States* v. *Thompson*, 827 F.2d 1254, 1262-63 (9th Cir. 1987) (Sneed, J., dissenting).

[10] Nine other judges joined opinions in this case expressly concluding that this Court has never clearly established the rule Ayala invokes. *See* Pet. App. 142a-145a (district court opinion); *id.* at 76a-80a (panel dissent); *id.* at 177a (dissent from denial of rehearing en banc).

respect to a fairly presented federal issue cannot be interpreted as an 'adjudication on the merits' of that issue for purposes of § 2254(d)." *Id.* at 21a. And it based that reasoning in part on the way this Court conducted AEDPA review in some prior cases, primarily *Rompilla* v. *Beard*, 545 U.S. 374 (2005), and *Wiggins* v. *Smith*, 539 U.S. 510 (2003). Pet. App. 19a-23a.

In those cases, state courts rejected federal claims of ineffective assistance of counsel after determining that there was no constitutional deficiency in counsel's performance, without addressing the separate question of prejudice under the two-part standard established by *Strickland* v. *Washington*, 466 U.S. 668 (1984). *See Rompilla*, 545 U.S. at 390; *Wiggins*, 539 U.S. at 518, 534. This Court concluded that the state determinations as to counsel's deficiencies involved unreasonable applications of *Strickland* within the meaning of § 2254(d)(1). *Rompilla*, 545 U.S. at 390; *Wiggins*, 539 U.S. at 534. It then assessed the question of prejudice de novo. *Rompilla*, 545 U.S. at 390; *Wiggins*, 539 U.S. at 534. The court of appeals here viewed these cases as establishing that "a state court's silence with respect to a part of a claim should not be interpreted as an 'adjudication on the merits' on that part for purposes of § 2254(d)." Pet. App. 21a.[11]

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[11] The court also cited *Porter* v. *McCollum*, 558 U.S. 30 (2009) (per curiam), and *Cone* v. *Bell*, 556 U.S. 449 (2009), but neither case adds anything to *Rompilla* and *Wiggins* on this point. *Porter* summarily reversed the rejection of another

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That conclusion places too much weight on a collateral aspect of *Rompilla* and *Wiggins*. The primary question in those cases was what the Constitution required defense counsel to do in investigating potential mitigating evidence in order to provide effective assistance of counsel. The question whether § 2254(d) required deferential consideration of *Strickland*'s prejudice component, as well as its deficient performance component, was not analyzed in the Court's opinions or argued by the parties, and it is not at all clear that the answer to that question would have made any difference in the outcome of either case. *See Rompilla*, 545 U.S. at 390 (concluding that Rompilla had shown prejudice "beyond any doubt," and noting that state did not contest the point"); *Wiggins*, 539 U.S. 534-38.[12] In contrast, this case squarely presents

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ineffective assistance claim, citing *Rompilla* for the proposition that the deficient-performance aspect of the claim should be reviewed de novo where the court of appeals had addressed only prejudice. *Id.* at 39. (Because the Court resolved the deficiency issue based on *Wiggins* and *Rompilla*, *see id.* at 39-40, the result would have been the same whether or not the Court applied AEDPA deference.) *Cone* likewise cited *Rompilla* and *Wiggins* as authority for conducting de novo review, *see* 556 U.S. at 472, but in that case the state court had declined to consider the claim on the mistaken premise that the claim had previously been considered and rejected. *Id.* at 458-60, 466-69. In that situation, it was clear that the state court had never actually considered the "intrinsic rights and wrongs" of *any* aspect of the claim. *See Tara Williams*, 133 S. Ct. at 1097.

[12] *See also Rompilla* v. *Beard*, Br. for Resp't., 2004 WL 3038118, at *37-47; *Wiggins* v. *Smith*, Br. for Resp't., 2003 WL 543903, at *46-49.

the issue – and the Court's recent opinions in *Richter* and *Tara Williams* have now analyzed how AEDPA deference operates in the context of two-part claims. The Court should now make clear that where, as here, a state court has denied relief on a federal claim after determining that any error that may have occurred was harmless, a federal court may not set aside the state conviction on the basis of that claim unless federal law clearly established by this Court's cases compels that result on the facts of the case.

5. That application of § 2254(d) to cases like this one comports with Congress's purposes in enacting AEDPA. As the Court has observed, AEDPA's standard for setting aside state convictions "is difficult to meet . . because it was meant to be." *Richter*, 131 S. Ct. at 786. "'Federal habeas review of state convictions frustrates the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.'" *Id.* at 787. "It 'disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority.'" *Id.* Congress determined that those costs are worth bearing only where cost of inaction would be correspondingly high. "Section 2254(d) reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems'. . . ." *Id.* at 786. It is "an extraordinary remedy, a bulwark against convictions that

violate fundamental fairness." *Brecht* v. *Abrahamson*, 507 U.S. 619, 633 (1993) (internal quotation marks omitted).

Such an "extreme malfunction[ ]" occurs when a state court decision leaves imprisoned a person to whom no fairminded jurist could deny relief under this Court's clearly established precedents. That situation is not presented, however, where application of this Court's holdings to the facts of record does not compel the conclusion that the prisoner is entitled to relief. This principle underlies *Richter*'s recognition that, where the specific reasons for a state court's denial of relief are unknown, a federal habeas court "must determine what arguments or theories . . . *could have supported*[ ] the state court's decision," and then "ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." 131 S. Ct. at 786 (emphasis added). And the same principle applies where, as here, a state court's denial of relief on the ground that any federal error was harmless made it unnecessary for that court to resolve whether an error occurred at all.

The court of appeals' contrary approach led it to review de novo a federal legal question that it should instead have considered only under AEDPA's highly restricted standard of review. *See* Pet. App. 24a. As in *Richter*, "it is not apparent how the Court of Appeals' analysis [of Ayala's federal claim] would have been any different without AEDPA." 131 S. Ct. at 786.

That result cannot be reconciled with the statute or with this Court's cases.

III. The Court of Appeals Improperly Assessed Harmlessness for Purposes of Federal Habeas Review

If the court of appeals had assessed Ayala's procedural *Batson* claim under AEDPA, it could have rejected the claim expeditiously on that basis. Alternatively, however, the court should also have been able to reject the claim without difficulty on the ground that there was nothing unreasonable about the California Supreme Court's conclusion that any error that might have occurred was harmless beyond a reasonable doubt. Instead, the court of appeals consciously disregarded the state court's analysis and conclusion on that question. *See* Pet. App. 31a-32a. It then conducted its own analysis based on speculation and hypothesis, rather than based on the existing record and with due regard for the observations and conclusions of the state trial court. This way of proceeding led the court to an unsustainable result.

A. A State Court's Reasonable Determination of Harmlessness May Not Be Set Aside Under Either *Brecht* or AEDPA

This Court has held that federal courts should assess whether an error warrants federal habeas relief using the "'actual prejudice'" standard of *Brecht* v. *Abrahamson*, 507 U.S. 619, 637 (1993). *See*

Fry v. *Pliler*, 551 U.S. 112, 116, 119 (2007). The Court has explained that application of *Brecht* should result in *more* deference to state court judgments than would result from applying AEDPA's deferential standards of review to a state court's determination that the error was harmless beyond a reasonable doubt under *Chapman* v. *California*, 386 U.S. 18 (1967). *Fry*, 551 U.S. at 119-20. Accordingly, if a state court's harmlessness analysis was not contrary to, or an unreasonable application of, *Chapman*, a federal habeas court assessing the same claim may not properly conclude that any error was prejudicial under *Brecht*.

1. Under *Chapman*, federal constitutional error requires reversal on direct appeal unless the government establishes that, under the circumstances of the case, the error was harmless beyond a reasonable doubt. 386 U.S. at 24. Even before AEDPA, however, a more restrictive standard applied on federal habeas review. Under *Brecht*, an error provides no basis for habeas relief unless it "resulted in 'actual prejudice'" – that is, a "'substantial and injurious effect or influence in determining the jury's verdict.'" 507 U.S. at 637.

In 1996, Congress enacted AEDPA. In 2003, this Court held that the deferential standard of review under the new Act applies to a federal habeas court's review of a state court's determination of harmlessness under *Chapman*. *Mitchell* v. *Esparza*, 540 U.S. 12, 18 (2003) (per curiam) ("We may not grant respondent's habeas petition . . if the state court

simply erred in concluding that the State's errors were harmless; rather, habeas relief is appropriate only if the Ohio Court of Appeals applied harmless-error review in an 'objectively unreasonable' manner." (citing AEDPA cases)); *see* pp. 23-24, *supra*.

In *Fry*, decided four years later, a state court denied relief on a claim using a harmlessness standard that might have been less demanding than *Chapman*. *See* 551 U.S. at 115 (state court "did not specify which harmless-error standard it was applying"). On federal habeas, the prisoner argued that AEDPA had superseded *Brecht,* that the state court had unreasonably applied this Court's precedent by failing to apply *Chapman*, and that the habeas court should grant relief based on a de novo application of *Chapman*. *See id.* at 118-19. This Court rejected that argument, holding that the habeas court should assess harm under *Brecht*. *Id*. at 120.

In reaching that conclusion, *Fry* reaffirmed *Mitchell*'s holding that, under AEDPA, "when a state court determines that a constitutional violation is harmless, a federal court may not award habeas relief under § 2254 unless *the harmlessness determination itself* was unreasonable." *Fry*, 551 U.S. at 119. The Court concluded, however, that this "AEDPA/*Chapman* standard," which "requires only that the state court's harmless-beyond-a-reasonable-doubt determination be unreasonable," was "more liberal" (*i.e.*, more favorable to the habeas petitioner) than "the *Brecht* standard of 'actual prejudice.'" *Id.* On that basis, it was implausible to conclude that

Congress had intended to replace the *Brecht* standard with AEDPA review of a state *Chapman* determination, "[g]iven [the Court's] frequent recognition that AEDPA limited rather than expanded the availability of habeas relief." *Id.* Having concluded that, in this context, application of *Brecht* would necessarily be more protective of state judgments than even AEDPA review, the Court also reasoned that it would "make[ ] no sense to require formal application of *both* tests (AEDPA/*Chapman* and *Brecht*) when the latter obviously subsumes the former." *Id.*

2. That analysis is sound as a purely logical matter. It can, however, break down in application. Here, for example, the court of appeals relied on *Fry* for the proposition that it should "'apply the *Brecht* test without regard for the state court's harmlessness determination.'" Pet. App. 31a-32a. A federal habeas court that views its task from that perspective can easily slip from *Fry*'s insight that it may not be necessary to require deferential review under *both* AEDPA and *Brecht* to the quite different position that there is no need to defer to a state court's judgment under *either*. *See, e.g.*, *id.* at 31a-32a & n.13 (asserting in passing that the court's *Brecht* result "necessarily determine[d]" that California Supreme Court's *Chapman* analysis was "unreasonable" under AEDPA – immediately after explaining that *Brecht* review would be conducted "'without regard for'" the state court's determination).

Nothing in *Fry*, however, purports to excuse federal courts from the statutory requirement that

they defer to state court decisions, including those based on harmlessness. *See* 551 U.S. at 119 (reaffirming *Mitchell*). To the contrary, *Fry* again underscored the need for federal habeas standards to protect "'States' interest in finality'" and their "'sovereignty over criminal matters.'" *Id.* at 117 (quoting *Brecht*, 507 U.S. at 637). *Fry* reiterated this Court's recognition that "'[s]tate courts are fully qualified to identify constitutional error and evaluate its prejudicial effects on the trial process . . and . . . often occupy a superior vantage point from which to evaluate the effect of trial error.'" *Id.* at 118 (quoting *Brecht*, 507 U.S. at 636). Any interpretation of *Brecht* that permits a federal habeas court to proceed "'without regard for [a] state court's harmlessness determination'" (Pet. App. 31a-32a) fails to honor these principles of federalism, comity, and judicial efficiency – not to mention the plain terms of § 2254(d).

For these reasons, the State suggests that the Court take this opportunity to emphasize that at least where, as here (but unlike in *Fry*), a state court has rejected a claim based on a reasoned analysis under *Chapman*, a federal habeas court may not override that determination unless it can fairly conclude that the state court's analysis is "unreasonable" under AEDPA.[13] Whether it is most efficient for

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[13] *See Kamlager* v. *Pollard*, 715 F.3d 1010, 1016 (7th Cir. 2013) (if state court conducted harmless-error analysis, federal habeas court first reviews whether that analysis was unreasonable; if unreasonable, court applies *Brecht* de novo); *Johnson* v.

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a court to approach the issue that way or, alternatively, through a direct analysis under *Brecht* is a matter that may vary from case to case. It is, however, critical for this Court to underscore that in this context *Brecht* analysis *subsumes*, not *supplants*, deference to state court judgments under AEDPA.

B. The Court of Appeals' Assessment of Prejudice in This Case Was Improper Under Both *Brecht* and AEDPA

With or without specific reference to AEDPA, in this case the court of appeals misapplied *Brecht*. To begin with, this Court has made clear that a "State is not to be put to th[e] arduous task [of retrying a case many years later] based on mere speculation that the defendant was prejudiced." *Calderon* v. *Coleman*, 525 U.S. 141, 146 (1998) (per curiam). Habeas relief is permissible only if "the defendant was actually prejudiced by the error." *Id.* Here, however, the court's analysis is dominated by speculation, as discussed below.

Acevedo, 572 F.3d 398, 404 (7th Cir. 2009) (same); *Cudjo* v. *Ayers*, 698 F.3d 752, 768 (9th Cir. 2012) (applying AEDPA deference to state *Chapman* determination); *but see Connolly* v. *Roden*, 752 F.3d 505, 511 (1st Cir. 2014) (courts not required to apply both tests; *Brecht* analysis necessarily satisfies AEDPA/*Chapman*); *Ruelas* v. *Wolfenbarger*, 580 F.3d 403, 412 (6th Cir. 2009) ("*Brecht* is always the test, and there is no reason to ask . . whether the state court 'unreasonably' applied *Chapman* under the AEDPA").

Similarly, in assessing *Batson* claims "the best evidence often will be the demeanor of the attorney who exercises the challenge," and "evaluation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province.'" *Hernandez* v. *New York*, 500 U.S. 352, 365 (1991) (plurality opinion). Thus, "'great deference'" is due to a trial court's "'evaluation of [the] credibility'" of a prosecutor's proffered explanations. *Felkner* v. *Jackson*, 131 S. Ct. 1305, 1307 (201[illegible]. Here, however, the court of appeals gave no deference at all to the assessments made at the time and on the scene by an experienced trial judge.

In sum, here, as in *Rice* v. *Collins*, 546 U.S. 333, 342 (2006) (another *Batson* case), the court of appeals' "attempt to use a series of debatable inferences to set aside the conclusion reached by the state court does not satisfy AEDPA's requirements" – or those of *Brecht*.

1. These errors are evident in the court of appeals' analysis of the three struck jurors on which it based its prejudice decision: Gerardo O., Robert M., and Olanders D.[14]

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[14] The court of appeals suggested in a footnote that "race [might] also have played a substantial role" in challenges of four other prospective jurors. Pet. App. 38a n.17. The footnote actually discusses only one other individual (George S.), and supplies no basis for disturbing the California Supreme Court's contrary conclusion, which was based on a much more thorough evaluation. *See Felkner*, 131 S. Ct. at 1307 (reversing decision

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a. The prosecutor justified his strike of Gerardo O. based on O.'s perceived "difficulties in writing, understanding and reading English," his "idiosyncratic dress and demeanor," his "aloofness from other prospective jurors," and his "inability to articulate any opinion about the death penalty." Pet. App. 205a. The trial judge, who personally observed both the prosecutor and O., agreed with and credited these explanations. *Id.* The California Supreme Court, after reviewing the record, observed that "Gerardo O. acknowledged . . . that someone else had to complete his questionnaire for him," "appeared to have difficulty understanding the nature of the proceedings the jury might have to follow," and "admitted to defense counsel that he did not understand some of [counsel's] questions." *Id.* at 205a n.2. After "defense counsel's thorough examination" regarding whether O. could impose the death penalty, "when the prosecutor asked Gerardo O. if he understood that the government was seeking the death penalty against defendant, he said, 'I didn't know that.'" *Id.* And O. "stated [that] he was unsure whether he could impose the death penalty." *Id.* The Supreme Court's own "review of the record tend[ed] to confirm [the prosecutor's and trial court's] observations." *Id.*

The court of appeals should have given great weight to the trial court's credibility finding under

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that asserted, without explanation, that comparably situated jurors were treated differently and prosecutor's explanations were insufficient).

Felkner, 131 S. Ct. at 1307, and should have deferred to the state Supreme Court's determination under *Rice*, 546 U.S. at 338-39. Instead, it engaged in unsupported speculation:

> It is likely that Gerardo O.'s dress and mannerisms were distinctly Hispanic. Perhaps in the late 1980s Hispanic males in San Diego County were more likely than members of other racial or ethnic groups in the area to wear a particular style or color of shirt, and Gerardo O. was wearing such a shirt (and for this reason did not "fit in," in the prosecutor's mind, with the other jurors).

Pet. App. 44a-45a.

The court suggested no basis for its conclusion that O.'s "dress and mannerisms" were "likely" "distinctly Hispanic." The hypothesis that Hispanic males at the time and place of trial might have worn a "particular style or color of shirt" was likewise bald speculation, as were the suppositions that O. was wearing such a shirt and that the prosecutor's comment that O.'s dress was "idiosyncratic" was therefore a coded comment about race. This sort of unsupported musing is no basis for a conclusion of "actual prejudice" under *Brecht*, and certainly no ground for rejecting the contrary conclusions of a state trial judge and a reasoned state appellate opinion. *Cf. Richter*, 131 S. Ct. at 789 (reversing decision that "rest[ed] in large part on a hypothesis that reasonably could have been rejected"). The court's error was only compounded by its related speculation as to what other jurors were

wearing or how they might have socialized with each other. Pet. App. 45a; *see* pp. 54-55, *infra*.

The court's evaluation of the communication issues identified by the prosecutor was likewise lacking. Gerardo O. acknowledged that someone else wrote his questionnaire responses for him, because he could not read or spell well in English. JA 163. He was unable to understand the trial court's questions about whether he would automatically vote not guilty based on his opinions concerning the death penalty. JA 164-65. The court of appeals deemed the prosecutor's reasons for the strike suspicious because concerns about communication were "directly related to [O.'s] status as someone who spoke Spanish as his first language." Pet. App. 44a. But concern that a juror who speaks and reads English poorly may miss parts of the evidence or instructions is perfectly legitimate on its face.[15] Nothing in these circumstances supported a finding of prejudice under *Brecht*, or rejection of the state court's conclusion under AEDPA.[16]

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[15] Nor is a focus on poor English skills a likely proxy for race. Both poor skills and proficiency are found among persons of all races.

[16] The court of appeals' reliance (Pet. App. 44a) on statements in *Hernandez* v. *New York*, 500 U.S. at 363 (plurality opinion), underscores its failure to apply habeas standards. In *Hernandez*, the prosecutor intentionally struck *Spanish* speakers, saying he feared they might rely on their own interpretation of Spanish testimony. *Id.* at 356. Here, the prosecutor struck a

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Finally, the court of appeals questioned the prosecutor's stated concerns about Gerardo O.'s hesitancy towards the death penalty, reasoning that other jurors were seated after first saying they were anti-death-penalty and then evincing more open-mindedness on voir dire. Pet. App. 46a-47a. But O. said in voir dire that he felt "shaky" about imposing the death penalty, because he was "not too sure if I can take someone else's life in my hands and . say, you know, 'death,' or something." JA 168. That O., after further questioning, said he "probably" could vote for a death sentence, and felt "a little bit" more comfortable given that other jurors would participate in the decision as well, JA 169-70, understandably would not inspire confidence in a prosecutor seeking a unanimous penalty verdict.

The court of appeals' reasoning with respect to Gerardo O. thus demonstrates disregard for *Brecht*'s rule limiting habeas relief to errors resulting in "'actual prejudice'" rather than possible or speculative prejudice, 507 U.S. at 637; for *Felkner*'s direction to give "'great deference'" to a trial court's "'evaluation of [the prosecutor's] credibility,'" 131 S. Ct. at 1307; and for AEDPA and *Rice*'s requirement of deference to the California Supreme Court's review of the record, 546 U.S. at 338-39.

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prospective juror who had trouble with *English*, making no reference to knowledge of other languages.

b. The prosecutor explained that he challenged Robert M. based on M.'s attitude toward the death penalty, and on M.'s having followed the controversial Sagon Penn case in the news. Pet. App. 114a-116a; JA 315-16. The trial court credited these answers, noting that although M. supported the death penalty, "'there may well be a legitimate concern as to whether or not he could impose it.'" Pet. App. 116a. The California Supreme Court credited this reasoning as well, concluding that the prosecutor was not biased and that "defense counsel's presence could not have affected the outcome" of the *Batson* proffers. *Id.* at 207a.

In its *Brecht* review, the court of appeals reasoned that M.'s knowledge of the Sagon Penn case could not have been a legitimate reason for dismissing him because another juror, Douglas S. had mentioned "a far more controversial capital case" without being struck. Pet. App. 50a. That argument does not withstand examination.

The Sagon Penn case, involving two notorious trials in which allegations of police brutality and prosecutorial misconduct led first to a mistrial and then to an acquittal, JA 316, raised allegations of widespread misconduct by the San Diego police – the same organization that investigated Ayala. *See* AP, *Man Acquitted of Killing Officer*, N.Y. Times, July 17, 1987, at B8. A trial judge's public accusations of police misconduct led to a state investigation alleging that San Diego officers "lied on the witness stand and altered evidence." Schachter, *State to Launch Inquiry*

of S.D. Police in Penn Case, L.A. Times, July 24, 1987, at 1. Allegations also touched the District Attorney's Office that tried Ayala.[17] Related scandals were still garnering headlines not long before Ayala's trial began in January, 1989 (Pet. App. 190a). *E.g.*, Serrano, *Inquiry Broadens in Shooting of Ex-Policeman*, L.A. Times, Nov. 30, 1988, at 2 (explaining claims that former officer was shot "in retaliation for his testimony against fellow officers in the Sagon Penn case").

In contrast, Douglas S. apparently mentioned the case of Robert Alton Harris. Pet. App. 50a. The Harris trial occurred in 1979 – a decade before Ayala's. *Harris* v. *Vasquez*, 949 F.2d 1497, 1500 (9th Cir. 1990). The court of appeals believed that the *Harris* case raised "allegations of official misconduct," Pet. App. 50a; but news coverage around the time of Ayala's trial focused not on misconduct, but on the possibility that Harris could be the first Californian executed since 1967. *E.g.*, Morain, *Appeal Lost; State's First Execution Since '67 Likely*, L.A. Times, July 9, 1988, at 1. A juror's interest in the Penn case raised obvious issues for Ayala's prosecutor that knowledge about the Harris case would not. In any case, the local trial judge was the person best positioned to know what

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[17] *See* Schachter, *Is Miller Losing Control of D.A.'s Office?*, L.A. Times, Sept. 20, 1987, at 1. Numerous news stories tracked the travails of one of Penn's prosecutors, who was portrayed as an alcoholic thief. *See, e.g.*, Warren, *Retrial Starts for D.A.'s Aide in Theft Case*, L.A. Times, Oct. 8, 1987, at 3.

news stories would be most concerning to a trial lawyer evaluating local jurors. The Ninth Circuit's opinion gives no reason to doubt the trial court's factual determination that the prosecutor's explanation for his strike was honest and that he did not strike M. or other jurors on the basis of race.

Regarding M.'s views on the death penalty, the court of appeals acknowledged that M. said that voting for the death penalty "would be a 'heavy' decision" that would "'weigh on his conscience.'" Pet. App. 48a.[18] But, the court hypothesized, "[o]ther prospective jurors who were struck by the defense, but had been accepted by the prosecution, *may* have made comparable statements in their questionnaires." *Id.* at 49a (emphasis added). Without addressing the deference due to the trial court's judgment of the prosecutor's credibility, or to the California Supreme Court under AEDPA, the court guessed that defense counsel, if present at the prosecutor's proffer, might have found a basis for persuading the trial court that M.'s answers were similar to those of other, seated jurors. Pet. App. 48a-49a.

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[18] In answer to a question asking whether he wanted to serve on this case, M. wrote, "'Realistically not. Curiosity yes. But inside I don't know.'" JA 155. During voir dire, he explained that having to make a life-or-death choice would weigh on his conscience. *Id.* Nevertheless, he was still curious about serving on a jury, and said he would like to serve as a juror sometime. *Id.* He subsequently reiterated that "to bring about the death penalty, you know, . . myself," would be a "heavy" decision. JA 156.

Only through sheer speculation could one conclude that the trial judge might ultimately have found that discriminatory animus best explained the prosecutor's dismissal of a prospective juror who had *both* expressed concern about having to impose the death penalty *and* followed a controversial trial alleging police misconduct in the same jurisdiction. The court of appeals' analysis of Robert M. fails to show "actual prejudice" as required by *Brecht* – particularly in light of the trial judge's contemporaneous acceptance of the prosecutor's explanations, and the California Supreme Court's independent decision finding any error in excluding defense counsel harmless beyond a reasonable doubt.

c. The prosecutor explained that he struck Olanders D. because D.'s questionnaire indicated opposition to the death penalty and his voir dire answers appearing to soften that opposition "'were not totally responsive.'" Pet. App. 203a. The prosecutor also said that D.'s difficulty in communicating led him to question whether D. would fit in on the jury. *Id.* Although the trial court "disagreed with the latter point," saying that D. might "'get along very well'" with other jurors, its different view on that point contained no implication that the prosecutor was being dishonest. *Id.* Indeed, the trial court found that "'the other observations of counsel are accurate and borne out by the record.'" *Id.* at 203a-204a. The California Supreme Court, which "scrutinize[d] [the record] closely," was "confident that the prosecutor was not violating *Wheeler*, and that defense counsel's

presence could not have affected the outcome of the *Wheeler* hearings." *Id.* at 207a & n.3.

In rejecting the trial court's and state Supreme Court's conclusions, the court of appeals hypothesized that defense counsel, if present, could have pointed to other prospective jurors who shared these characteristics but were not challenged, and that this could have shown that the prosecutor's strike was based on race. Pet. App. 40a-43a. As the dissenting judge pointed out, however, "even if the prosecutor's perceptions were incorrect or not unique, that . . would not be such compelling evidence of pretext as to justify a failure to defer to the California Supreme Court's reasoned determination that the jurors were excused for proper race-neutral reasons." *Id.* at 111a (Callahan, J., dissenting).

Moreover, the court of appeals acknowledged that there was no evidence contradicting "the prosecution's final reason for striking Olanders D. – that his questionnaire responses were 'poor,' and demonstrated his inability to express himself." Pet. App. 41a. Whereas the trial judge, who saw D.'s questionnaire and heard his responses face-to-face, *agreed* with the prosecutor that D. "'demonstrated a lack of ability to express himself well,'" the court below admitted it could "only speculate as to [the questionnaire's] contents"; it had "no way of knowing," *id.* at 41a-42a. Under either *Brecht* or § 2254(d), such speculation should not have been allowed to overpower the trial judge's *actual*

finding agreeing with the prosecutor's evaluation.[19] That is particularly true because the federal court did not take issue with the California Supreme Court's informed judgment that the trial judge was not only "in command of the law and the facts" but also "diligent, prepared, knowledgeable, and engaged in the proceedings, including those relating to defendant's *Wheeler* motion." Pet. App. 210a.

2. The court of appeals sought to explain its resort to speculation on the ground that the lack of contemporaneous counterarguments by Ayala's counsel, and the loss of some juror questionnaires, made more concrete factual review impossible on a record impaired by error. *E.g.*, Pet. App. 42a; *id.* at 45a-46a ("We can only speculate as to whether or how Ayala could have shown this explanation for striking Gerardo O. to be facially discriminatory, false or pretextual, because we know nothing about his dress or mannerisms or that of the other prospective jurors."). But it is always possible to speculate that there are relevant facts not in the record. On federal habeas review, *Brecht* requires a determination of *actual* prejudice to justify relief. And that standard surely cannot be met by musings such as this:

> [P]erhaps . . a seated white juror had actually worn an outfit identical to Gerardo

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[19] *See id.* at 107a (court of appeals' dissent) (quoting trial judge's statement that he agreed with prosecutor's observations about Olanders D. except for the suspicion about whether he would get along with other jurors).

> O.'s. . . [P]erhaps, unbeknownst to the trial judge, Gerardo O. did 'socializ[e] or mix[ ]' with a number of other jurors, and had even organized a dinner for some of them at his favorite Mexican restaurant.

Pet. App. 45a.

A state court's failure to keep perfect records, though regrettable, does not excuse federal habeas courts from applying the actual prejudice rule. In *Rushen* v. *Spain*, 464 U.S. 114 (1983) (per curiam), for example, a prisoner complained about the trial judge's undisclosed, mid-trial, ex parte contacts with a juror over issues of possible bias. *Id.* at 115-16. The trial judge did not make any record of his conversations with the juror or disclose them to the defense. *Id.* at 116. The only record was made during the defendant's motion for a new trial, when the juror and trial judge each gave their recollections of events. *Id.* at 116; *id.* at 134-36 (Marshall, J., dissenting). The state appellate court affirmed the conviction, finding "the ex parte communications to be . . harmless 'beyond a reasonable doubt' because the jury's deliberations, as a whole, were unbiased." *Id.* at 117 (opinion for the Court). A federal district court granted habeas relief, and the Ninth Circuit affirmed because "'the condition of the record made it impossible to apply intelligently the harmless error test.'" *Id.* at 138 (Marshall, J., dissenting) (quoting Ninth Circuit opinion).

This Court reversed, applying a "presumption of correctness" to "questions of historical fact" such as

"[t]he substance of the *ex parte* communications and their effect on juror impartiality" – "question[s] the state courts were in a far better position than the federal courts to answer." *Id.* at 120 (opinion for the Court). Finding "more than adequate support" for the state court's harmless-error conclusion, this Court held that "[t]he lower federal courts should have deferred to this presumptively correct state court finding and therefore found the alleged constitutional error harmless beyond a reasonable doubt." *Id.* at 121.

Rushen held that federal courts were obliged to defer to state-court determinations about the effect of ex parte communications even when the communications were undisclosed and untranscribed. Here, the fact of the ex parte communication was known to defense counsel, and the entire communication was transcribed for the record and reviewed on appeal. *Rushen* required deference to a state-court *Chapman* determination even before Congress enacted AEDPA, and before this Court imposed *Brecht*'s higher prejudice burden in federal habeas. Here, Ayala is subject to *Brecht* and to § 2254(d). Particularly in light of *Rushen*, Ayala cannot prevail on his post-AEDPA, post-*Brecht* claim.

* * *

At most, the court of appeals' analysis of prejudice in this case indicates that the existing record does not *compel* the conclusion that the prosecutor at Ayala's trial excluded jurors for race-neutral reasons. That, however, is not the question on federal habeas review. *See, e.g.*, Pet. App. 119a (Callahan, J., dissenting). The court's discussion does not come close to establishing that the contrary determinations of the state trial court, made contemporaneously and based on personal observation, are not worthy of respect, or that the state Supreme Court's independent application of *Chapman* on direct appeal was *unreasonable* or contrary to any decision of this Court. Accordingly, even if AEDPA would allow a determination that there was underlying federal error in this case, under a proper *Brecht* analysis there is no basis for finding the "actual prejudice" that would be required to warrant habeas relief.

CONCLUSION

The judgment of the court of appeals should be reversed.

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RESPONDENT'S BRIEF

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KEVIN CHAPPELL, WARDEN,

Petitioner,

v.

HECTOR AYALA,

Respondent.

On Writ of Certiorari to
the United States Court of Appeals for
the Ninth Circuit

RESPONDENT'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1. Whether a state court's rejection of a claim of federal constitutional error on the ground that any error, if one occurred, was harmless beyond a reasonable doubt is an "adjudicat[ion] on the merits" within the meaning of 28 U.S.C. § 2254(d), so that a federal court may set aside the resulting final state conviction only if the defendant can satisfy the restrictive standards imposed by that provision.

2. Whether the court of appeals properly applied the standard articulated in *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

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FEDERAL STATUTES, REGULATIONS, AND RULES

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STATEMENT OF THE CASE

1. Trial

In 1989, Respondent, Hector Ayala ("Ayala"), who is Hispanic, was tried for the murder of three men, which occurred in 1985. *See* PA 225a, 2a-3a.[1] Jury selection was lengthy, spanning a period of three months. PA 3a. There were three stages to jury selection. First, prospective panelists were screened for hardship. *See* JA 124.[2] Following the hardship screening, there were 214 prospective jurors remaining in the jury pool. *See* PA 3a; JA 135. Each of these 214 prospective jurors completed a 77-question, 17-page questionnaire for purposes of jury selection. PA 3a; *see also, e.g.*, JA 110-23.[3] Of these 214 prospective jurors, at least 38 were of minority descent.[4]

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[1] "PA" refers to the appendix filed with the petition for writ of certiorari.

[2] "JA" refers to the Joint Appendix filed with Petitioner's brief.

[3] Although the formatted version of the questionnaire is 14 pages when reproduced according to the Court's formatting requirements, this was in fact a 17-page questionnaire in its original form – as were all of the juror questionnaires. *See, e.g.*, JA 110 (noting in square braces at the third line from the top that the questionnaire spans pages 5762 through 5778); *see also* 27 Clerk's Transcript 5762-78.

[4] The surviving record reveals 38 prospective jurors of minority descent, but there may have been more. JA 133, 160, 207, 210, 217-18, 225-26, 236-37, 245-46, 254, 256, 276-77, 286, 304-05, 322; 22 Reporter's Transcript (hereinafter referred to as "RT") 2064; 25 RT 2536; 27 RT 2869; 39 RT 4403; 40 RT 4648; 41 RT 4742, 4768-70; 42 RT 4874-75, 4924; 43 RT 5137; 48 RT 5701; 49 RT 6022-23.

In the second stage of jury selection – "*Hovey* examination" – conducted pursuant to *Hovey v. Superior Court*, 28 Cal.3d 1 (1980), prospective jurors were examined individually and in sequestration regarding death penalty issues. *See, e.g.*, JA 124, 135-37, 143-44. The trial court also allowed examination on other topics based on panelists' responses to various questions in the juror questionnaire, and this stage was therefore often referred to as the "expanded *Hovey* examination." *See, e.g.*, JA 124, 135-37.

The third and final stage of jury selection involved general group voir dire. *See, e.g.*, 49 RT 5839-40. During this stage of jury selection, the trial court allotted 20 peremptory challenges to each party. PA 3a; JA 272. Of these 20 challenges, the prosecution used 18. PA 3a. Seven of the prosecution's 18 challenges were used to strike prospective jurors of black or Hispanic descent. *Id.* The seven panelists of minority descent struck by the prosecution were: Galileo S., Olanders D., Luis M., Geraldo O., George S., Barbara S. and Robert M. JA 275-77, 285-87, 300-01, 303-06. The prosecution thus struck all of the black and Hispanic prospective jurors available for challenge, resulting in a jury that was devoid of any minority members. *See* PA 3a. In response, Ayala, who is Hispanic, brought three separate motions[5] pursuant to *People v. Wheeler*, 22 Cal.3d 258 (1978) – California's equivalent to *Batson v. Kentucky*, 476 U.S. 79 (1986) – claiming that the prosecution was systematically excluding minority jurors on the basis of race. PA 3a-4a & n.1; JA 276-79, 286-87, 304-305.

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[5] These motions are referred to as the "*Batson* motions."

Upon the first *Batson* motion, the court required the prosecution to state its reasons for challenging the jurors in question. The prosecutor responded that he did not want to reveal trial strategy to the defense. PA 4a, 196a-197a; JA 277, 279. Over the defense's objections, the court granted a private hearing with the prosecution, excluding Ayala and his lawyer, at which the prosecutor stated his purported reasons for the peremptory challenge. PA 4a; JA 277-79, 282-84. Upon the second and third *Batson* motions, the trial court continued to employ this ex parte, *in camera* procedure to hear and consider the prosecutor's purported reasons for challenging prospective minority jurors. PA 4a; JA 297-99, 309-17.

During the third *Batson* motion, the defense objected that the prosecution had "systematically used their challenges to bleach clean the box of people of minority persuasion." JA 304. Indeed, the trial court found that that the prosecution's use of 7 peremptory challenges to strike minority jurors showed a pattern of excluding minorities, which constituted a prima facie showing of racial discrimination. PA 4a; JA 309. The court ruled: "[T]hat is every juror that's been available for challenge that has been Hispanic and/or black has been challenged by The People. ... [¶] Clearly, then, that would show a pattern of exclusion ... of the minorities that have thus far hit the box .... " JA 305-06.

In spite of the fact that the prosecution had used 7 peremptory strikes to "bleach clean the box" of potential minority jurors, the trial court denied all three *Batson* motions made by the defense, ruling

that the prosecution had race-neutral reasons for striking each of the seven minority jurors. PA 4a. Ayala's jury was thus devoid of any minority jurors.

Ayala was convicted on three counts of murder, one count of attempted murder, one count of robbery and two counts of attempted robbery. PA 2a, 5a. Ayala subsequently received a death sentence. PA 190a.

During the jury selection process, the court collected all of the 214 juror questionnaires. PA 5a; JA 148. However, at some point during or following the trial, all the questionnaires were lost, except those of the twelve jurors, the six alternates and three additional prospective jurors. PA 5a; JA 326-27, 323-25. The questionnaires for the remaining 193 prospective jurors have never been located. PA 5a; JA 326-27.

2. The California Supreme Court

On direct appeal from his conviction, Ayala challenged the ex parte, *in camera Batson* hearings as being unconstitutional. PA 5a. In addition, Ayala appealed on the basis that the ex parte *Batson* hearings and the loss of the jury questionnaires deprived him of his constitutional right to a meaningful appeal of the denial of his *Batson* motions.[6] *Id.* A divided California Supreme Court upheld Ayala's conviction on the basis of harmless error, with a vigorous dissent by Chief Justice George. PA 189a-261a.

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[6] Ayala also appealed on numerous other grounds. *See, e.g.*, PA 214a-226a.

The California Supreme Court found "no matters of trial strategy were revealed" by the prosecution during the ex parte *Batson* hearings.[7] PA 10a, 200a. The court held "as a matter of state law," that "it was error to exclude defendant from participating in [the *Batson* hearings]." PA 10a, 200a. Relying on multiple federal cases which themselves rely on federal constitutional law, the California Supreme Court concluded: "it seems to be almost universally recognized that ex parte [*Batson* hearings] ... should not be conducted unless compelling reasons justify them." PA 201a, 10a-11a, 14a-15a (citing, among other cases, *United States v. Roan Eagle*, 867 F.2d 436, 441 (8th Cir. 1989); *United States v. Garrison*, 849 F.2d 103, 106 (4th Cir. 1988); *United States v. Gordon*, 817 F.2d 1538, 1541 (11th Cir. 1987)). In Ayala's case, because the prosecution revealed no matters of trial strategy during the *Batson* hearings, there were no such "compelling reasons," and the court "concluded that error occurred under state law." PA 11a, 203a.

In finding error under state law, the California Supreme Court quoted extensively from *United States v. Thompson*, 827 F.2d 1254 (9th Cir. 1987), a case in which the Ninth Circuit held that ex parte *Batson* hearings violated federal constitutional law. PA 15a, 201a-203a. For example, the court took from *Thompson* that "[a]bsent ... compelling justification, ex parte proceedings are anathema in our system of justice and ... may amount to a denial of due process." PA 202a-203a (quoting *Thompson*,

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[7] The three ex parte, *in camera Batson* hearings conducted by the trial court in Ayala's case are referred to as "the *Batson* hearings."

827 F.2d at 1258-59). The California Supreme Court agreed with *Thompson*, stating: "it is error in particular to conduct ex parte proceedings on a *Wheeler* motion because of the risk that defendant's inability to rebut the prosecution's stated reasons will leave the record incomplete." PA 203a. The court thus held "that error occurred under state law, and we have noted *Thompson*'s suggestion that excluding the defense from a *Wheeler*-type hearing may amount to a denial of due process." *Id.*

Regarding prejudice, the California Supreme Court held "that the error was harmless under state law (*People v. Watson*, 46 Cal. 2d 818, 836 (1956)), and that, if federal error occurred, it, too, was harmless beyond a reasonable doubt (*Chapman v. California,* 386 U.S. 18, 24 (1967)) as a matter of federal law. On the record before us, we are confident that the challenged jurors were excluded for proper, race-neutral reasons." PA 203a.

The California Supreme Court rejected Ayala's claim regarding the lost juror questionnaires on the basis of prejudice, finding that even if the loss of the questionnaires "was federal error, it was harmless beyond a reasonable doubt (*Chapman v. California*, *supra*, 386 U.S. 18, 24) ...." PA 25a, 213a.

Chief Justice George vociferously dissented from the California Supreme Court majority's "unprecedented conclusion that the erroneous exclusion of the defense from a crucial portion of jury selection proceedings may be deemed harmless." PA 6a, 245a. The Chief Justice pointed out that "the majority would be unable to properly rely upon the record made below to reach a reliable decision on the *Wheeler/Batson* issue. The record on this issue is

incomplete, having been erroneously constructed with the input of only the prosecution and the court, and without crucial and necessary participation by defendant and his counsel." PA 253a-254a. Chief Justice George reasoned that "it is unrealistic to expect that a judge in the midst of trial will be able to pick out the discrepancies in a prosecutor's justifications, especially where, as here, 70 panelists, whose questionnaires alone covered 77 questions, participated in the general voir dire." PA 257a. Chief Justice George found the record to be "irremediably incomplete" and that because of the lost juror questionnaires, "the record cannot be reconstructed." PA 260a, 256a. The dissent thus concluded that "we simply cannot credit this record, and an appellate court cannot serve its review function when it cannot be satisfied that the record is complete as to the relevant facts." PA 258a (citing *Thompson*, 827 F.2d at 1261).

3. The Ninth Circuit's Federal Habeas Review

On habeas review, the Ninth Circuit considered two of Ayala's claims of constitutional violation: (i) the exclusion of Ayala and his counsel from the *Batson* hearings; and (ii) the loss of the juror questionnaires. PA 6a-8a. These claims were reviewed by the Ninth Circuit pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). PA 2a.

The Ninth Circuit found that the California Supreme Court did not expressly rule on whether the exclusion of Ayala and his counsel from the *Batson* hearings was federal error (having found only that "if federal error occurred, it ... was harmless beyond a

reasonable doubt."). PA 11a. The Ninth Circuit recognized that there are only three possible interpretations of the California Supreme Court's silence on this issue (the three "options"):

> (1) The California Supreme Court found that there was error under federal constitutional law;
>
> (2) The California Supreme Court did not decide whether there was error under federal constitutional law; or
>
> (3) The California Supreme Court held that there was no error under federal constitutional law.

PA 11a-12a. The Ninth Circuit reasoned that Option 3 is "wholly implausible" because: (i) the California Supreme Court found state law error under *Wheeler*, which is stricter than its federal equivalent under *Batson* (i.e., there cannot be *Wheeler* error unless there is *Batson* error), and thus the California Supreme Court must also have found federal error under *Batson*; (ii) the California Supreme Court found error under state law by citing to federal cases relying on federal law; and (iii) the California Supreme Court "noted" that there might have been a violation of federal law. PA 22a & n.6.

The Ninth Circuit held that the California Supreme Court either determined that Ayala's exclusion from the *Batson* hearings was federal constitutional error (Option 1), or made no determination as to whether this was federal constitutional error (Option 2). PA 2a, 22a n.5. The

Ninth Circuit therefore conducted a de novo analysis of Ayala's exclusion from the *Batson* hearings pursuant to AEDPA, concluding the exclusion constituted federal constitutional error. PA 2a. The court similarly found the loss of the juror questionnaires to be federal constitutional error. PA 26a.

The Ninth Circuit reviewed the California Supreme Court's determination that any federal error in Ayala's case was harmless, under the *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) "substantial and injurious effect or influence" standard. PA 2a, 31a. The court held that "Ayala has met the *Brecht* standard. The prejudice he suffered was the deprivation of the opportunity to develop, present, and likely prevail on his *Batson* claim." PA 34a.

The Ninth Circuit reasoned as follows:

> Here, it is probable that the state's errors precluded Ayala from turning what is a very plausible *Batson* claim – the challenge to the prosecution's strikes of all minority jurors – into a winning one by preventing defense counsel from performing the two "crucial functions" we identified in [*United States v. Thompson*, 827 F.2d 1254, 1260-61 (9th Cir. 1987)]. First, Ayala's counsel could have pointed out where the prosecution's purported justifications might be pretextual or indicate bad faith. Although the trial judge may have been able to "detect some of these deficiencies by himself, ... there might be arguments [he] would

overlook" because he was "unassisted by an advocate." *Thompson*, 827 F.2d at 1260-61. The jury selection process took over three months and comprises more than six thousand pages of the record. The trial judge, attempting to evaluate the prosecution's reasons for striking the jurors in light of this massive amount of information, was almost certain to forget or overlook key facts, but could have been substantially aided by the presence of participants in the process adverse to the prosecution. In particular, Ayala's lawyers could have pointed out when the prosecutor's proffered reason for striking a black or Hispanic juror applied "just as well to an otherwise-similar nonblack [or non-Hispanic] who [was] permitted to serve." *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005). The Supreme Court has emphasized the importance of this sort of "comparative juror analysis" to determining whether a prosecutor's reasons for challenging a minority juror were pretextual. *Id.*; *see also Snyder v. Louisiana*, 552 U.S. 472, 483–85 (2008).

...

Second, Ayala's counsel could have "preserve[d] for the record, and possible appeal, crucial facts bearing on the judge's decision." *Thompson*, 827 F.2d at 1261. We cannot know many of the facts material to whether the

prosecution's stated reasons were false, discriminatory, or pretextual because defense counsel was not able to preserve relevant facts regarding prospective jurors' physical appearances, behavior, or other characteristics. Although the trial judge could have been aware of these facts, an appellate court "can only serve [its] function when the record is clear as to the relevant facts, or when defense counsel fails to point out any such facts after learning of the prosecutor's reasons." *Id.*

...

This second deficiency is greatly augmented by the loss of the jury questionnaires. ... We are unable to evaluate the legitimacy of some of the prosecution's proffered reasons for striking the black and Hispanic jurors because they referred to questionnaires that are now lost. The loss of the questionnaires also leaves us lacking potentially crucial information about certain individuals who were neither the subject of Ayala's *Batson* challenge nor ultimately served as jurors. Thus, we cannot perform a fair comparative juror analysis as required by *Batson*. *See Miller-El v. Dretke*, 545 U.S. at 241.

Even so, we have substantial reason to question the motivation of the prosecution in engaging in its peremptory challenges of the black and

> Hispanic jurors. In conducting our inquiry, we must keep in mind the strength of Ayala's prima facie case. "[T]he statistical evidence alone raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors." [*Miller-El v. Cockrell*, 537 U.S. 322, 342 (2003)]. That the prosecution struck each of the seven black or Hispanic jurors available for challenge establishes a basis for significant doubt of its motives: "[h]appenstance is unlikely to produce this disparity." *Id.*

PA 35a-38a (footnotes omitted). The Ninth Circuit further held that Ayala was prejudiced under the AEDPA/*Chapman* standard, stating: "In holding that Ayala has demonstrated his entitlement to relief under *Brecht*, we therefore also hold to be an unreasonable application of *Chapman* the California Supreme Court's conclusion that Ayala was not prejudiced by the exclusion of the defense during *Batson* steps two and three or by the loss of the questionnaires." PA 32a n.13.

The Ninth Circuit assiduously assessed the prosecution's reasons for striking three exemplary minority jurors, in order to demonstrate that even on the partial surviving record, many of the prosecution's reasons appeared false, discriminatory, or pretextual. PA 38a-51a.

The Ninth Circuit concluded its finding under the *Brecht* standard by detailing the caustic prejudice the state caused by holding ex parte hearings and by losing the juror questionnaires:

Because the defense was excluded from the *Batson* proceedings, it could not bring necessary facts and arguments to the attention of the trial judge, the institutional actor best positioned to evaluate the prosecution's credibility and to determine if its proffered reasons for striking the minority jurors were its actual and legitimate reasons. Furthermore, because the defense was excluded from the *Batson* proceedings, the appellate courts reviewing this case cannot engage in a proper comparative juror analysis, or know what other facts and arguments might be employed to demonstrate that the proffered reasons were false, facially discriminatory, and pretextual. The latter form of prejudice was exacerbated when the vast majority of the juror questionnaires were lost.

Even on this deficient record, Ayala's *Batson* claim is compelling: the prosecution struck all seven of the black and Hispanic jurors in a position to serve on the jury, and many of its proffered race-neutral reasons are highly implausible. Given the strength of Ayala's prima facie case, the evidence that the prosecution's proffered reasons were false or discriminatory, and the inferences that can be drawn from the available comparative juror analysis, it is "impossible to conclude that [Ayala's] substantial rights were not affected" by the exclusion of defense counsel from

> the *Batson* proceedings. *Kotteakos v. United States*, 328 U.S. 750, 765 (1946). Ayala has suffered prejudice under *Brecht*, and is entitled to relief. When that demonstration of prejudice is supplemented by the state's loss of the juror questionnaires, the case for prejudice under *Brecht* is even more clear.

PA 52a-53a.

SUMMARY OF ARGUMENT

Ayala and his counsel were excluded from a critical voir dire stage of his trial – three *Batson* hearings during which the prosecution provided its reasons for using seven peremptory strikes to strike prospective jurors of minority descent. The California Supreme Court found the exclusion of Ayala and his counsel from the *Batson* hearings to be state law error under *Wheeler*, California's equivalent to *Batson*, but was silent as to whether there was federal error, ruling that if there was federal error, it was harmless.

The Ninth Circuit properly analyzed the two elements of Ayala's claim, error and prejudice, individually. This is the method of analysis dictated by this Court in *Wiggins v. Smith*, 539 U.S. 510 (2003), *Rompilla v. Beard*, 545 U.S. 374 (2005), and *Porter v. McCollum*, 558 U.S. 30, 39-40 (2009).

The Ninth Circuit correctly held that the best interpretation of the California Supreme Court's silence is that the California Supreme Court found federal error, because: (i) the court found state law

error in the *Wheeler* procedure, which is equivalent to finding federal law error in *Batson* procedure; (ii) the court based its finding of state law error on federal law; (iii) the court's same analysis which led to a finding of state law error leads to a finding of federal constitutional error; (iv) this is consistent with the Court's holding in *Johnson v. Williams*, 133 S. Ct. 1088, 1098-99 (2013), that when a state court relies on federal cases or federal law to reach a finding on an issue of state law, without expressly making a finding on the federal issue, the state court has similarly decided the federal issue. Furthermore, interpreting the California Supreme Court's silence as finding federal error is the only interpretation that gives deference to the court's finding of state law error, as the alternative interpretations (that the California Supreme Court found no federal error or did not decide the issue) completely ignore the California Supreme Court's finding of state law error.

The State argues, tautologically, that "a federal court applying AEDPA has no basis for concluding that any error in excluding Ayala's counsel from *Batson* proffers warrants relief under the 'actual prejudice' standard of *Brecht* ...." Petitioner's Br., p. 17. However, this Court has specifically mandated that a federal court applying AEDPA is to analyze prejudice under *Brecht*'s "substantial and injurious effect or influence" standard, as it subsumes the AEDPA/*Chapman* standard. *Fry v. Pliler*, 551 U.S. 112, 119-122 (2007). The Ninth Circuit was therefore correct to apply the *Brecht* standard to the California Supreme Court's prejudice finding.

The Ninth Circuit correctly held that "Ayala has met the *Brecht* standard. The prejudice he suffered was the deprivation of the opportunity to develop, present, and likely prevail on his *Batson* claim." PA 34a. The exclusion of Ayala and his counsel from the *Batson* hearings deprived Ayala of: (1) rebuttal argument in response to the prosecution's proffered reasons for its strikes; (2) voir dire questioning aimed at rebutting the prosecution's reasons; (3) a full and proper comparative juror analysis; and (4) an adequate record. In addition, all of this harm was exacerbated by the loss of 193 of the 214 juror questionnaires, resulting in an "irremediably incomplete" record. The Ninth Circuit, therefore, correctly concluded that Ayala likely would have prevailed on his *Batson* claim, had he been given the opportunity to fully develop and present it. The Ninth Circuit's reasoning is supported by the existing record on the basis that: the prosecution used 7 peremptory strikes to strike every prospective juror of minority descent who was available for challenge; no minority jurors sat on Ayala's jury; the proportion of minority panelists in the jury pool following hardship culling was at least 18%; many of the prosecution's reasons for striking minority panelists appear pretextual; and only 1 of the 7 peremptory strikes by the prosecution need be based on race in order for Ayala to prevail on his *Batson* claim.

The State's argument that application of the *Brecht* prejudice standard fails to give deference to the California Supreme Court, is empty and hyperbolic. The Ninth Circuit expressly gave deference, pursuant to AEDPA, to the California Supreme Court in its *Brecht* analysis. The State is

merely trying to set up an absolute bar to habeas relief – a result rejected even under the State's preferred precedent, *Harrington v. Richter*, 131 S. Ct. 770, 784-785 (2011).

ARGUMENT

1. The Ninth Circuit Analyzed Error and Prejudice Individually, in Accordance With AEDPA, as Dictated by *Wiggins*, *Rompilla* and *Porter*.

The Ninth Circuit's review of Ayala's appeal was governed by AEDPA. PA 2a. The Ninth Circuit reviewed Ayala's claim of federal constitutional error according to the two elements of which it is comprised: (1) the existence of federal error, and (2) prejudice to Ayala resulting from the error. PA 6a. This is the correct method of analysis for a habeas claim. *See Wiggins v. Smith*, 539 U.S. 510, 520-21, 528-29, 534 (2003); *Rompilla v. Beard*, 545 U.S. 374, 380-390 (2005); *Porter v. McCollum*, 558 U.S. 30, 39-40 (2009). Though these three cases involve ineffective assistance of counsel claims under *Strickland v. Washington*, 466 U.S. 668 (1984), as with all habeas claims, the claims have two elements: (1) the existence of error, i.e., that the prisoner's counsel's performance was deficient, and (2) the existence of prejudice, i.e., that the deficient performance prejudiced the prisoner. *Id.* at 687. A *Strickland* claim only succeeds if both elements are met, and fails if either element is not satisfied. *Id.* State courts are thus able to deny *Strickland* claims by deciding only one of the elements. In such cases, this Court reviews a *Strickland* claim by analyzing each element separately under AEDPA. While the *Strickland* tests (for error and prejudice) and

standards of review may differ from those applicable in a non-ineffective assistance of counsel cases such as Ayala's (see *Richter*, 131 S. Ct. at 788, and Sections 2-4), the method of analysis (analyzing each prong separately under AEDPA) is analogous.

In both *Wiggins* and *Rompilla*, this Court reviewed claims which had been denied by the state courts based only on the first prong – the existence of error, i.e., the state courts found no deficiency in counsel's performance. *Wiggins*, 539 U.S. at 517-18; *Rompilla*, 545 U.S. at 378. Applying AEDPA, this Court still analyzed each prong separately. *Wiggins*, 539 U.S. at 520-21, 528-29, 534; *Rompilla*, 545 U.S. at 380-90. In both cases, the first prong was subject to AEDPA's "unreasonable application of law" standard, because this was the prong, which the state courts had decided. *See Wiggins*, 539 U.S. at 520-34; *Rompilla*, 545 U.S. at 380-89. The second prong (prejudice) was subject to de novo review, because this was the prong which the state courts had not decided. *Wiggins*, 539 U.S. at 534; *Rompilla*, 545 U.S. at 390.

This Court again followed the *Wiggins/Rompilla* method of reviewing each prong separately in *Porter v. McCollum*, 558 U.S. 30 (2009). In *Porter*, the state court had denied relief based only on the second prong, finding that the defendant suffered no prejudice. *Porter*, 558 U.S. at 36-37, 39-40. Applying AEDPA, this Court reviewed the first prong de novo, because the state court made no finding as to whether the defendant's counsel was deficient. *Id.* at 39.

Here, the Ninth Circuit correctly followed the method of analysis set forth by this Court in *Wiggins*,

Rompilla and *Porter* for reviewing habeas claims under AEDPA, by separately analyzing each of the two elements of Ayala's claim: (1) the existence of federal error, and (2) prejudice to Ayala resulting from the error. Regarding the first element: (i) assuming the California Supreme Court found federal error (in Ayala's favor), the Ninth Circuit affirmed this finding both under AEDPA's "unreasonable application of law" standard and under de novo review (see Section 2); and (ii) assuming the California Supreme Court made no determination as to whether Ayala's exclusion from the *Batson* hearings was federal error, the Ninth Circuit found federal error under de novo review (see Section 3). PA 12a n.4, 17a. Regarding the second element, the Ninth Circuit found prejudice under the *Brecht* standard, which "subsumes" the "more liberal" AEDPA/*Chapman* standard, in accordance with *Fry* (see Sections 4 and 5). PA 32a n.13, 34a. The State's argument that *Richter* somehow requires a different method of analysis is incorrect. *See Sussman v. Jenkins,* 642 F.3d 532, 534 (7th Cir. 2011) ("We certainly cannot assume that the Court [in *Richter*] overruled *sub silentio* its holding in *Wiggins* – a precedent so important to the daily work of the lower federal courts."); *Rayner v. Mills,* 685 F.3d 631, 639 (6th Cir. 2012) ("[Supreme Court cases] mandate AEDPA deference to both prongs when the state court decision summarily dismisses the claim without explanation; when a state court decision relies only on one prong, the cases mandate AEDPA deference to that prong and de novo consideration of the unadjudicated prong.").

2. The California Supreme Court Either Found Federal Error, in Favor of Ayala, or Intentionally Did Not Reach the Question of Federal Error. Assuming the California Supreme Court Found Federal Error, the Ninth Circuit Correctly Followed AEDPA in Reviewing This Finding.

a. The Best Interpretation of the California Supreme Court's Decision is That the Court Found Federal Error, Because Its Finding of *Wheeler* Error Under California Law Necessarily Encompasses *Batson* Error Under Federal Law and the Court Based Its Decision on Federal Law.

The California Supreme Court made no express finding as to whether the exclusion of Ayala and his counsel from the *Batson* hearings was federal constitutional error. PA 11a. Rather, the court held that it was state error to exclude Ayala and his counsel from the *Wheeler* [*Batson*] hearings. PA 10a, 200a.

There are two reasonable bases for inferring that the California Supreme Court found federal error. First, the court must have inherently found federal error because "California courts interpret a violation of *Wheeler* – California's state equivalent of *Batson* – as proof of a violation of *Batson*. *See People v. Yeoman*, 72 P.3d 1166, 1187 (Cal. 2003)." PA 15a.

Batson prohibits peremptory strikes from being used to exclude potential jurors according to

their race. *Batson v. Kentucky*, 476 U.S. 79, 88-89 (1986). To this end, *Batson* uses a three step test. *Step 1:* The defense must make a prima facie showing that the prosecution exercised a peremptory strike based on race. *Batson*, 476 U.S. at 93-97. *Step 2*: The prosecution must provide a "neutral explanation" for challenging a prospective juror, based on something other than the venireman's race. *Batson*, 476 U.S. at 97-98. *Step 3*: The trial court then has a duty to determine whether the defense has established that the peremptory strike purposefully discriminates on the basis of race. *Batson*, 476 U.S. at 98.

California's equivalent to *Batson* – the *Wheeler* test – imposes a stricter standard in the first step of *Batson*. Under *Batson*'s first step, the defense need only make a prima facie showing, which gives "rise to an inference" that the strike was made based on race. *Batson*, 476 U.S. at 93-94; *Johnson v. California*, 545 U.S. 162, 169 (2005) ("[In *Batson*,] we held that a prima facie case of discrimination can be made out ... so long as the sum of the proffered facts gives 'rise to an inference of discriminatory purpose.'"). Under California's *Wheeler* standard, in order to make a prima facie showing of discrimination in the first step, the defense must "show a strong likelihood that" the strike was impermissibly based on race. *People v. Wheeler*, 22 Cal.3d 258, 280 (1978). California's standard is thus more demanding than *Batson*. *See Johnson v. California*, 545 U.S. 162, 173 (2005).

It follows that since the California Supreme Court found state law error in the *Wheeler* procedure followed in Ayala's case, the court must necessarily

also have found this to be federal constitutional error according to *Batson* procedure. As the Ninth Circuit correctly put it: "[B]ecause *Wheeler* is *Batson*-plus, and because its *Wheeler* holding relied on *Batson* case law, it is impossible that the California Supreme Court found no *Batson* error on the merits while finding *Wheeler* error on the merits." PA 22a n.6. The Ninth Circuit's holding is consistent with *Johnson v. Williams*, 133 S. Ct. 1088, 1096 (2013), in which this Court held that "if the state-law rule subsumes the federal standard – that is, if it is at least as protective as the federal standard – then the federal claim may be regarded as having been adjudicated on the merits."

The second basis for inferring that the California Supreme Court found federal error, is that the court's finding of state law error was based on federal constitutional law. The California Supreme Court held that it is "almost universally recognized" that ex parte *Batson* hearings are erroneous, expressly relying on multiple federal cases that themselves rely on federal constitutional law. PA 201a, 10a-11a, 14a-15a (citing, among other federal cases, *United States v. Roan Eagle*, 867 F.2d 436, 441 (8th Cir. 1989); *United States v. Garrison*, 849 F.2d 103, 106 (4th Cir. 1988); *United States v. Gordon*, 817 F.2d 1538, 1541 (11th Cir. 1987)). In addition, the California Supreme Court's reasoning quoted extensively from *United States v. Thompson*, 827 F.2d 1254 (9th Cir. 1987), in which the Ninth Circuit held ex parte *Batson* hearings to violate federal constitutional law. PA 15a, 201a-203a. Indeed, the court's ultimate finding of state law error in Ayala's case mirrored the reasoning in *Thompson*: "it is error in particular to conduct ex parte proceedings on a

Wheeler motion because of the risk that defendant's inability to rebut the prosecution's stated reasons will leave the record incomplete." PA 203a (where *Thompson*, 827 F.2d at 1258-59 states: "[a]bsent such compelling justification, ex parte proceedings are anathema in our system of justice and ... may amount to a denial of due process."). "The obvious message here is that the California Supreme Court believed that the federal constitutional issue should be decided the same way as the state law issue." PA 15a.

That the California Supreme Court relied for its finding of state law error upon federal cases and federal law, is in and of itself sufficient to conclude that the California Supreme Court also found federal error. This Court has held that when a state court relies on federal cases or federal law to reach a finding on an issue of state law, without expressly making a finding on the federal issue, the state court has similarly decided the federal issue. *Johnson v. Williams*, 133 S. Ct. 1088, 1098-99 (2013). In *Williams*, a California court had found there to be no state law error partly on the basis of federal cases relying on federal law, without expressly making any finding as to federal error. *Id.* This Court held in *Williams*, that because the California court's state law error analysis relied on federal law, the court had likewise found no error under federal law. *Id.*

The obverse of the *Williams* case is necessarily true with respect to the California Supreme Court's analysis in Ayala's case. PA 16a. The California Supreme Court found the exclusion of Ayala from the *Batson* hearings to be error under state law (in comparison to *Williams*, where the state court found

no state law error), and cited to multiple federal cases relying on federal law. PA 201a-203a. This Court reasoned, in *Williams*, that the California Supreme Court "did not expressly purport to decide a federal constitutional question, but its discussion of [the federal cases] shows that the California Supreme Court understood itself to be deciding a question with federal constitutional dimensions." *Johnson v. Williams*, 133 S. Ct. 1088, 1098 (2013). Here, the California Supreme Court also did not expressly purport to decide the federal constitutional question, but it too must have understood itself to be deciding a question with federal constitutional dimensions, and to be deciding it in Ayala's favor by its reliance on cases that held analogous conduct to be erroneous under the federal Constitution. PA 16a-17a.

b. It is Impossible that the California Supreme Court Found No Federal Error, Because This Would Completely Undermine Its Finding of *Wheeler* Error Under California Law.

It is impossible that the California Supreme Court found no federal error, as such a finding is diametrically opposed to the court's finding of error under state law. The Ninth Circuit aptly noted: "[B]ecause *Wheeler* is *Batson*-plus, and because its *Wheeler* holding relied on *Batson* case law, it is impossible that the California Supreme Court found no *Batson* error on the merits while finding *Wheeler* error on the merits." PA 22a n.6. If this Court were to hold that the California Supreme Court found no federal error, this would necessarily overturn the

California Supreme Court's finding of state law *Wheeler* error.

c. The Ninth Circuit Correctly Followed AEDPA in Reviewing the California Supreme Court's Finding of Federal Error.

Right at the outset, the Ninth Circuit recognized that Ayala's appeal was to be reviewed pursuant to AEDPA.[8] PA 2a. The Ninth Circuit held that the California Supreme Court either determined that Ayala's exclusion from the *Batson* hearings was federal constitutional error, or made no determination as to whether this was federal constitutional error. PA 2a, 22a n.5. Of these two possibilities, the Ninth Circuit decided it more likely that the California Supreme Court found federal constitutional error, because the California Supreme Court (1) found state law error (2) based on federal constitutional law, (3) and the same analysis would

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[8] The AEDPA provision at issue reads as follows: "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

28 U.S.C. § 2254(d).

lead to a finding of federal constitutional error, (4) which is the approach supported by this Court (as discussed in Section 2(a)) in *Johnson v. Williams*, 133 S. Ct. 1088, 1098-99 (2013). *See* PA 14a-17a.

Assuming the California Supreme Court found federal error in favor of Ayala, the proper standard of review for this finding would be an issue of first impression. PA 12a n.4. Accordingly, there are three possible standards of review: (1) deference to the California Supreme Court's finding pursuant to AEDPA *in favor of Ayala*;[9] (2) de novo review; and (3) no review at all, on the basis that a state court's determination in favor of Ayala cannot be relitigated on habeas review. *Id.* Under all three standards of review, the result is the same according to the Ninth Circuit's holding: there was federal constitutional error in Ayala's trial. PA 12a n.4.

The State argues that under AEDPA review, Ayala should lose, because there is no clearly established federal law prohibiting the exclusion of a defendant and his counsel from *Batson* hearings. *See* Petitioner's Br., pp. 32-33. The State is mistaken. The exclusion of the defense from *Batson* hearings is forbidden according to the Sixth Amendment's right to counsel. PA 55a-56a. The Sixth Amendment's right to counsel applies to all 'critical' stages of the proceedings. *United States v. Wade*, 388 U.S. 218, 224–25 (1967). This right has been clearly

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[9] In this case, the California Supreme Court's determination that there was federal constitutional error (in favor of Ayala), could only be overturned if this determination "was contrary to, or involved an unreasonable application of, clearly established Federal law ...." 28 U.S.C. § 2254(d).

established federal law since its inception, and its scope has been well established by multiple holdings of this Court. *See, e.g.*, *White v. Maryland*, 373 U.S. 59, 60 (1963); *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963).

"The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 656 (1984). Only when the essential guarantee of the assistance of counsel has been met can there be a "true adversarial criminal trial ... envisioned by the Sixth Amendment ...." *Id.* "[I]f the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." *Cronic*, 466 U.S. at 656-57. Indeed, "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *Id.* at 658.

This Court has held that "jury selection is 'a critical stage' of the felony trial ...." *Peretz v. United States*, 501 U.S. 923, 950 (1991) (citing *Gomez v. United States*, 490 U.S. 858, 873 (1989)). Given that the Sixth Amendment's right to counsel applies to all critical stages of trial, and jury selection is a critical stage of trial, it follows that defendants have a constitutional right to counsel at *Batson* hearings. This right is violated when counsel is excluded from *Batson* hearings absent compelling reasons.

Batson made clear that a court must consider "all relevant circumstances" in deciding whether a prosecutor's stated reasons for striking a particular juror are race-neutral, and, if race-neutral, whether

they are his actual reasons. 476 U.S. at 96–99; *see Miller-El v. Dretke*, 545 U.S. 231, 240 (2005). Thus, Defense counsel must perform "two crucial functions" at *Batson* hearings. *United States v. Thompson*, 827 F.2d 1254, 1260 (9th Cir. 1987). The first is "to point out to the district judge where the government's stated reason may indicate bad faith." *Id.* at 1260. The second is to "preserve for the record, and possible appeal, crucial facts bearing on the judge's decision." *Id.* at 1261. The *Thompson* Court explained:

> All we have before us concerning this issue is the prosecutor's explanation of her reasons and the district judge's ruling.... [I]f we are to review the district judge's decision, we cannot affirm simply because we are confident he must have known what he was doing. We can only serve our function when the record is clear as to the relevant facts, or when defense counsel fails to point out any such facts after learning of the prosecutor's reasons .... [¶] Here, the record's silence cannot be reassuring.

Thompson, 827 F.2d at 1261. Only with the presence and assistance of defense counsel can a trial judge and subsequent appellate judges properly evaluate discriminatory intent by the prosecution under *Batson*. PA 58a; *Thompson*, 827 F.2d at 1260-61. Excluding the defense from *Batson* hearings without some compelling justification therefore violates the Constitution. PA 58a; *Thompson*, 827 F.2d at 1259-61.

The California Supreme Court recognized defendants' right to counsel at *Batson* hearings, admitting that: "it seems to be almost universally recognized that ex parte [*Batson* hearings] ... should not be conducted unless compelling reasons justify them." PA 201a, 10a-11a, 14a-15a (citing, among other cases, *United States v. Roan Eagle*, 867 F.2d 436, 441 (8th Cir. 1989); *United States v. Garrison*, 849 F.2d 103, 106 (4th Cir. 1988); *United States v. Gordon*, 817 F.2d 1538, 1541 (11th Cir. 1987)). This Court has also held, with regard to *Batson* hearings, that "[i]n the rare case in which the explanation for a challenge would entail confidential communications or reveal trial strategy, an *in camera* discussion can be arranged." *Georgia v. McCollum*, 505 U.S. 42, 58 (1992). This, of course, means that absent compelling reasons for an *in camera Batson* hearing, the exclusion of counsel is unconstitutional.

The State wrongly inculcates *Teague v. Lane*, 489 U.S. 288 (1989) into the mix, arguing that the Ninth Circuit found the rule against excluding the defense from *Batson* hearings to be established based only on Circuit precedent. *See* Petitioner's Br., p. 33. However, the Ninth Circuit explicitly stated that the rule stems from "the straightforward application of two lines of Supreme Court precedent. The first line of precedent finds its source in the Sixth Amendment's guarantee of the right to counsel. ... [¶] *Batson* is the seminal case in the second line of precedent." PA 55a-56a.

The State doggedly harps on the fact that *Batson* declined to set forth "particular procedures" to be followed upon a *Batson* challenge by the defense. *See* Petitioner's Br., pp. 4, 11, 17, 32. The

State is essentially arguing that no clearly established rule exists unless this Court has ruled on the particular factual scenario implicating a constitutional right. The State's argument is preposterous, as it would require this Court to instantiate specific rules for each and every factual scenario in which a proceeding may be unconstitutional. That this Court declined to micromanage the appropriate methods a trial court may employ to ensure constitutional rights are protected, does not mean there are no clearly established constitutional rights which must be observed.

This Court need not prescribe particular procedures according to which *Batson* hearings must occur, any more so than the Court need prescribe particular procedures according to which any other part of a constitutionally-afforded trial must occur (such as opening statement, closing argument or witness examination). That this Court did not specify all of the procedures for conducting *Batson* hearings is not a preordained blessing for trial courts to conduct *Batson* hearings in any manner whatsoever without constitutional constraint. It means courts may exercise discretion in conducting *Batson* hearings, provided they are conducted in a constitutional manner.

The State mistakenly argues that because two courts (the Sixth and Seventh Circuits) have permitted the exclusion of defense counsel from *Batson* hearings in compelling circumstances, there is no clear rule prohibiting the exclusion of defense counsel from *Batson* hearings. *See* Petitioner's Br., pp. 32-33 & n.9. The Ninth Circuit correctly

dispelled this faulty notion outright: "[M]any constitutional rules recognize exceptions – *e.g.*, the exigency exception to the Fourth Amendment prohibition on warrantless searches, and the public safety exception to *Miranda* – but that does not make the rules any less clear." PA 55a n.21; *see also Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (noting that the federal constitutional due process right to defend "is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process").[10]

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[10] The State relies on two cases where ex parte *Batson* hearings were permitted: *United States v. Tucker*, 836 F.2d 334, 340 (7th Cir. 1988) and *United States v. Davis*, 809 F.2d 1194, 1200 (6th Cir. 1987). Petitioner's Br., pp. 32-33 & n.9. In *Tucker*, the Seventh Circuit rejected the rule that defense counsel must be present at *Batson* hearings unless there are compelling circumstances, because it concluded that the exception permitting ex parte proceedings in compelling circumstances "swallows the ... rule." *Tucker*, 836 F.2d at 340. However, as explained above, the fact that a rule is subject to an exception – no matter how broad – does not make the rule any less clear. Indeed, the Seventh Circuit acknowledged in *Tucker*, "that adversarial hearings are the appropriate method for handling most *Batson*-type disputes," and that trial judges should "utilize an adversarial procedure whenever possible." *Tucker*, 836 F.2d at 340. In sum, the Seventh Circuit does recognize the establishment of the rule that defense counsel must be present at *Batson* hearings unless there are compelling circumstances – the Seventh Circuit merely declined to follow the rule.

In *Davis*, the Sixth Circuit declined to recognize "a per se rule to be followed ... whenever a *Batson* challenge arises," namely that the defense's "presence at the *in camera* [*Batson*] proceeding [is] constitutionally compelled." *United States v. Davis*, 809 F.2d 1194, 1201, 1202 (6th Cir. 1987). Thus, the Sixth Circuit's position may be understood as observing that there is no absolute right to an adversarial *Batson* hearing, which is not entirely inconsistent with the rule at issue, in that

Moreover, by the time Ayala's conviction was final, nearly every court to have considered the issue – both state and federal – acknowledged that excluding the defense from *Batson* hearings is unconstitutional. PA 60a-61a; see *Thompson*, 827 F.2d 1254; *United States v. Garrison*, 849 F.2d 103, 106 (4th Cir. 1988) ("We ... agree with the Ninth Circuit that the important rights guaranteed by *Batson* deserve the full protection of the adversarial process except where compelling reasons requiring secrecy are shown."); *United States v. Roan Eagle*, 867 F.2d 436, 441 (8th Cir. 1989) ("[O]nce the prosecutor has advanced his racially neutral explanation, the defendant should have the opportunity to rebut with his own interpretation."); *United States v. Gordon*, 817 F.2d 1538, 1541 (11th Cir. 1987); *People v. Ayala*, 6 P.3d 193, 203 (Cal. 2000); *Goode v. Shoukfeh*, 943 S.W.2d 441, 452 (Tex. 1997); *People v. Hameed*, 88 N.Y.2d 232, 238 (1996); *State v. Hood*, 245 Kan. 367, 378 (1989); *Gray v. State*, 317 Md. 250, 257–58 (1989); *Commonwealth v. Jackson*, 386 Pa. Super. 29, 51 (1989); *Commonwealth v. Futch*, 38 Mass. App. Ct. 174, 178 (1995); *but see United States v. Tucker*, 836 F.2d 334, 340 (7th Cir. 1988) and *United States v. Davis*, 809 F.2d 1194, 1200 (6th Cir. 1987) (discussed above in footnote 10). This Court also acknowledged that for *Batson* hearings, "[i]n the rare case in which the explanation for a challenge would entail confidential communications or reveal trial strategy, an *in camera* discussion can be arranged." *Georgia v. McCollum*, 505 U.S. 42, 58 (1992).

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the rule at issue allows for exceptions in compelling circumstances.

The exclusion of defense counsel from *Batson* hearings is unconstitutional absent compelling reasons, just as the exclusion of defense counsel from other critical stages of trial (e.g., closing argument or witness examination) is unconstitutional absent compelling reasons. While compelling reasons permitting the exclusion of defense counsel from *Batson* hearings might sometimes exist, this does nothing to detract from the clear establishment of the rule that excluding defense counsel from *Batson* hearings is unconstitutional.

In any event, it is of no consequence that two courts have declined to follow the "almost universally recognized" rule that ex parte *Batson* hearings are unconstitutional. Under AEDPA, the issue is whether this rule is "clearly established Federal law, as determined by the Supreme Court of the United States," and only this Court's precedents are relevant in that regard. 28 U.S.C. § 2254(d). As set forth above, those precedents outlaw ex parte *Batson* hearings.

3. In the Alternative, Assuming the California Supreme Court Did Not Reach the Question of Federal Error, the Ninth Circuit Correctly Applied De Novo Review.

In the alternative, assuming the California Supreme Court made no determination as to whether Ayala's exclusion from the *Batson* hearings was federal constitutional error, the proper standard of review is de novo. PA 12a n.4, 17a; *See Cone v. Bell*, 556 U.S. 449, 472 (2009) (reviewing de novo because the "[state] courts did not reach the merits of [the petitioner's constitutional] claim"); *Lott v.*

Trammel, 705 F.3d 1167, 1218 (10th Cir. 2013); *Harris v. Thompson*, 698 F.3d 609, 624 (7th Cir. 2012). De novo is the only logical standard of review, as AEDPA cannot apply if there was no decision by the California Supreme Court, i.e., no deference can be given to a decision that was never rendered. *See Wiggins v. Smith*, 539 U.S. 510, 534 (2003) ("[O]ur review is not circumscribed by a state court conclusion with respect to prejudice, as neither of the state courts below reached this element of the *Strickland* analysis."); *Rompilla v. Beard*, 545 U.S. 374, 390 (2005) ("Because the state courts found the representation adequate, they never reached the issue of prejudice ..., and so we examine this element of the *Strickland* claim *de novo*") (citations omitted); *Porter v. McCollum*, 558 U.S. 30, 39 (2009) ("Because the state court did not decide whether Porter's counsel was deficient, we review this element of Porter's *Strickland* claim de novo."). "Indeed, respect for state judges requires recognizing that a state court's silence with respect to a fairly presented federal claim may be intentional and prudent." PA 19a.

Under de novo review, the Ninth Circuit correctly held that it was federal constitutional error to exclude Ayala and his counsel from the *Batson* hearings, because there was no compelling justification for doing so, given that none of the prosecution's reasons for its peremptory strikes revealed matters of trial strategy. PA 24a.

The Ninth Circuit also properly applied de novo review in analyzing the loss of the juror questionnaires, because the California Supreme Court decided this claim based on prejudice alone,

and did not reach the question of whether the loss of the questionnaires constituted federal error. PA 25a, 213a ("Thus, even if there was federal error, it was harmless beyond a reasonable doubt."). The Ninth Circuit correctly found that the loss of the juror questionnaires deprived Ayala of his federal due process right to a meaningful appeal, because the lost questionnaires render the record inadequate for appeal. PA 25a-27a.

a. The *Richter/Williams* Presumption is Inapplicable Because the Basis for the California Supreme Court's Holding is Known.

The *Richter/Williams* presumption is inapplicable here. *Harrington v. Richter*, 131 S. Ct. 770, 784-85 (2011); *Johnson v. Williams*, 133 S. Ct. 1088, 1094 (2013). In *Richter* and *Williams*, this Court established the rebuttable presumption that when a state court is silent as to a fairly presented federal claim, the claim was adjudicated (rejected) on the merits (against the petitioner) absent "any indication or state-law procedural principles to the contrary." *Richter*, 131 S. Ct. at 784-85; *Williams*, 133 S. Ct. at 1094. "The presumption may be overcome when there is reason to think some other explanation for the state court's decision is more likely." *Richter*, 131 S. Ct. at 785.

The Ninth Circuit correctly determined that the *Richter/Williams* presumption is rebutted, as the "most likely interpretation" of the California Supreme Court's finding is that Ayala's exclusion from the *Batson* hearings was federal constitutional error, because the California Supreme Court (i) found state law error, (ii) based on federal

constitutional law, (iii) and the same analysis would lead to a finding of federal constitutional error, (iv) which is the precise approach supported by this Court in *Williams*, 133 S. Ct. at 1098-99. PA 14a-17a.

In addition, it was unnecessary for the California Supreme Court to find federal error in order to reject Ayala's claim. PA 14a. The California Supreme Court was able to, and did, deny Ayala relief based only on the second prong of Ayala's claim – prejudice. PA 14a, 203a. The State seeks to apply the *Richter/Williams* presumption against Ayala to the first prong of federal error, even when there was no reason for the California Supreme Court to reach the question of federal error. In accordance with "long established legal principles, the California Supreme Court had every reason not to decide unnecessarily a question of federal constitutional law." PA 21a, 18a; *Clinton v. Jones*, 520 U.S. 681, 690 n.11 (1997) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that courts ought not to pass on questions of constitutionality ... unless such adjudication is unavoidable.").

The State misunderstands the purpose of the *Richter/Williams* presumption. The presumption addresses the situation in which a state court has denied relief, while being silent as to a federal claim. Here, however, the California Supreme Court was not silent as to Ayala's federal claim. The court analyzed his claim, discussing the applicable federal authority in depth, and specifically denied relief only on the basis of prejudice. Thus, there is no need to apply any presumption. The State should

understand this given the State's acknowledgment that the *Richter* presumption applies "where the specific reasons for a state court's denial of relief are unknown." Petitioner's Br., p 37.

Most troubling is the State's attempt to impose the *Richter/Williams* decisions to create an absurd fictional presumption that the exclusion of Ayala and his counsel from the *Batson* hearings was not federal error. Irrespective of what can be presumed from the California Supreme Court's reasoning, it is impossible to infer that the court found Ayala's exclusion not to be federal error. *See James v. Ryan*, 733 F.3d 911, 916 (9th Cir. 2013) ("[*Williams*] does not require us to ignore a state court's explicit explanation of its own decision.").

4. The Ninth Circuit Correctly Reviewed the California Supreme Court's Harmless Error Decision Under the *Brecht* Standard of Review.

a. *Brecht* is the Proper Standard for Reviewing Prejudice in Habeas Cases.

The California Supreme Court held that if federal error occurred in Ayala's case, any such error "was harmless beyond a reasonable doubt" pursuant to *Chapman v. California*, 386 U.S. 18, 24 (1967). PA 203a. Prior to *Fry v. Pliler*, 551 U.S. 112 (2007). this decision was subject to the AEDPA/*Chapman* standard of review, i.e., whether the California court's determination of harmless error (under *Chapman*) constituted an unreasonable application of federal law. PA 32a n.13. However, in *Fry*, this Court clarified that the correct standard of review for

harmless error determinations under AEDPA is set forth in *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993). *Fry*, 551 U.S. at 119-122. The *Brecht* standard is whether the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 623. This Court held that the *Brecht* standard "subsumes" the "more liberal" AEDPA/*Chapman* standard. *Fry*, 551 U.S. at 119-120. The Ninth Circuit thus correctly reviewed the California Supreme Court's harmless error decision under *Brecht*'s "substantial and injurious effect" standard. PA 31a.

The State stubbornly refuses to accept that *Brecht* is the correct standard. *See* Petitioner's Br. pp. 42-43 & n.13. However, all of the State's cited cases recognize that *Brecht* is the governing standard of review. *See Cudjo v. Ayers*, 698 F.3d 752, 768-69 (9th Cir. 2012); *Kamlager v. Pollard*, 715 F.3d 1010, 1016 (7th Cir. 2013); and *Johnson v. Acevedo*, 572 F.3d 398, 404 (7th Cir. 2009). The cases cited by the State merely note that courts may apply the AEDPA/*Chapman* standard before applying *Brecht*, and in two of the State's cited cases (*Kamlager* and *Acevedo*) the courts indeed disposed of claims based on an AEDPA/*Chapman* analysis without having to perform a *Brecht* analysis. *See id.* This is of no consequence, because the *Brecht* standard subsumes the AEDPA/*Chapman* standard, which the State acknowledges. *Fry*, 551 U.S. at 119-120; Petitioner's Br. p 43. Therefore, any claim which cannot meet the AEDPA/*Chapman* standard necessarily cannot meet the *Brecht* standard. *See Fry*, 551 U.S. at 119-120. Similarly, a claim which satisfies the *Brecht* standard necessarily also satisfies the AEDPA/*Chapman* standard. *See id.*; PA 32a n.13.

In any event, the State's argument is moot, because the Ninth Circuit held that its finding of prejudice under *Brecht* inherently also constitutes a finding of prejudice under AEDPA/*Chapman*: "In holding that Ayala has demonstrated his entitlement to relief under *Brecht*, we therefore also hold to be an unreasonable application of *Chapman* the California Supreme Court's conclusion that Ayala was not prejudiced by the exclusion of the defense during *Batson* steps two and three or by the loss of the questionnaires." PA 32a n.13.

b. *Richter*'s "Fairminded Jurist" Standard Does Not Replace *Brecht* – "a Case Cited Almost 10,000 Times to Determine Prejudice" – for Assessing Prejudice in Ayala's Case.

Alternatively, the State wrongly seeks to impose the *Richter* standard of review, i.e., that under AEDPA, the California Supreme Court's judgment cannot be set aside unless there is "is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents." *See, e.g.*, Petitioner's Br. p. 37; *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011). As the Ninth Circuit aptly explained:

> In *Fry*, 551 U.S. 112, the Supreme Court held that *Brecht* is the proper test for prejudice analysis under AEDPA. In *Richter*, handed down just four years later, the Supreme Court did not once mention *Fry* or *Brecht*. Furthermore, the Court's reference to "fairminded jurist" was not in the context of reviewing a state court's prejudice

> determination but rather in the context of whether a state court's determination regarding constitutional error was unreasonable. 131 S. Ct. at 785. .... The [State] thus seems willing to conclude that the Supreme Court radically changed *Brecht*, a nearly two decade old precedent – a case with central import in virtually all federal habeas adjudication, reaffirmed just [seven] years ago in *Fry* — without even a mention of that oft-cited case. There is no legal basis for the [State's] conclusion that a case cited almost 10,000 times to determine prejudice in habeas cases was sub silentio drastically overhauled in a discussion unrelated to prejudice.

PA 33a n.14 (emphasis added).

Furthermore, *Richter*'s "fairminded jurist" standard is specially tailored to reviewing whether there is error in ineffective assistance of counsel cases. *See Richter*, 131 S. Ct. at 788 ("Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d)."). *Strickland* cases are subject to special standards on review that are different from those applicable in other cases, like Ayala's, which do not involve a *Strickland* claim. *See Richter*, 131 S. Ct. at 788 ("The standards created by *Strickland* and § 2254(d) are both 'highly deferential,' ..., and when the two apply in tandem, review is 'doubly' so ...."). Moreover, the *Richter* standard presumes that there is a complete record

before the reviewing court. It would be unfair to hold any prisoner to *Richter*'s onerous "no possibility fairminded jurists could disagree" standard based on an incomplete record – especially a record so grossly inadequate as to be irremediably incomplete, like Ayala's.

c. The State's Argument for AEDPA Deference to the California Supreme Court is Empty – This is Really an Argument For an Absolute Bar to Habeas Relief.

The State is attempting to create an absolute bar by increasing the level of AEDPA deference to a point beyond reproach, such that no need for further review is warranted. *See, e.g.*, Petitioner's Br. pp. 19, 36-37, 39. To give deference, however, does not mean to surrender all inquiry. As this Court has said (under different AEDPA provisions): "Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). Even under the State's preferred *Richter* standard, AEDPA "stops short of imposing a complete bar." *Richter*, 131 S. Ct. at 786.

The State bemoans the supposed lack of deference given by the Ninth Circuit to the California Supreme Court. *See e.g.*, Petitioner's Br., pp. 18, 20, 36-39, 41-42, 44, 48. However, the Ninth Circuit gave express deference to the California Court. In identifying the three possible interpretations of the California Supreme Court's silence as to whether there was federal error, the Ninth Circuit held that the best interpretation was

the only one that gave deference to the California Supreme Court's finding of state law error. The Ninth Circuit further gave deference to the California Supreme Court in finding not only that there was prejudice under *Brecht*, but also under AEDPA/*Chapman*: "we ... also hold to be an unreasonable application of *Chapman* the California Supreme Court's conclusion that Ayala was not prejudiced by the exclusion of the defense during *Batson* steps two and three or by the loss of the questionnaires." PA 32a n.13.

The State is frustrated because it views the Ninth Circuit's approach as having avoided AEDPA deference, arguing that "it is not apparent how the Court of Appeals' analysis of Ayala's federal claim would have been any different without AEDPA." Petitioner's Br., p. 37. In this regard, the State is its own source of frustration. The Ninth Circuit conducted its entire review under AEDPA, and applied AEDPA correctly. PA 2a. The Ninth Circuit followed this Court's method in *Wiggins*, *Rompilla* and *Porter* for reviewing habeas appeals under AEDPA, by individually analyzing the error element and the prejudice element. With, or without, AEDPA the State must concede that the most reasonable interpretation of the error element is that the California Supreme Court found federal error. Thus, even AEDPA's "unreasonable application of law" standard inures to the benefit of Ayala. With, or without, AEDPA the State must concede that "[d]eference does not by definition preclude relief." *Miller-El v. Cockrell*, *supra*, at 340. The Ninth Circuit was tasked with judicial review of the California Supreme Court's prejudice determination, and under the strict *Brecht* standard, which

subsumes the more liberal AEDPA/*Chapman* standard, the Ninth Circuit found the error had a substantial and injurious effect.

The State's argument that the Ninth Circuit's method of analysis will open a floodgate of de novo review of state court rulings deserving of AEDPA review (Petitioner's Br., p. 28), is self-serving. As the Ninth Circuit meticulously followed this Court's required analysis, such a 'floodgate' has always been open; yet, the State has pointed to no actual flood of de novo reviews by federal courts.

5. The Ninth Circuit Properly Found Prejudice Under the *Brecht* Standard, Because the Harm to Ayala Was "Substantial and Injurious."

As a result of the exclusion of Ayala and his counsel from the *Batson* hearings: (1) Ayala was deprived of the opportunity to offer any argument to rebut the prosecution's proffered reasons for its peremptory strikes; (2) Ayala was deprived of the opportunity to conduct any voir dire questioning aimed at rebutting the prosecution's reasons (e.g., questioning establishing that other non-minority panelists shared the same characteristics for which the minority panelists were struck by the prosecution); (3) Ayala was unable to conduct a full and proper comparative juror analysis; and (4) the record is irremediably incomplete. All of this harm was compounded by the government's loss of 193 of the 214 juror questionnaires. The Ninth Circuit's determination that Ayala's preclusion from fully developing and presenting a case of *Batson* error – both at trial and on appeal – was substantial and

injurious, is both reasonable and well-founded under *Brecht* and AEDPA.

The Ninth Circuit correctly recognized that Ayala is not presenting "an ordinary *Batson* challenge on habeas review – a challenge to the holding in a case in which defense counsel was able to present arguments to the trial court regarding racial bias, appeal that claim to the state appellate court, and subsequently seek reversal in federal court of the judgment that none of the jurors was struck by the prosecution for impermissible racially motivated reasons." PA 68a. "This ... is a case in which the challenge is to the procedure employed by the trial court in conducting the *Batson* inquiry – a procedure that resulted in the denial of a fair *Batson* hearing to the defendant." PA 68a. Thus, it does not fall upon Ayala to show that he should have prevailed on his *Batson* claim, but only that he was deprived of the proper opportunity to fully develop and present that claim. *Id.* Had Ayala not been deprived of this opportunity, he likely would have prevailed on his *Batson* claim. Thus, the denial directly had a substantial and injurious effect in determining the jury's verdict.

a. Ayala Would Likely Have Prevailed on a Fully Developed *Batson* Claim Given the Statistics and the Prosecution's Pretextual Reasons.

Though Ayala was precluded from fully developing and presenting a case of *Batson* error, the statistical evidence in the surviving record is compelling. There were 214 prospective jurors remaining in the jury pool after the hardship screening. *See* PA 3a; JA 135. Of these 214

prospective jurors, at least 38 were of minority descent. *See supra*, footnote 4. Thus, 18% of the jury pool was made up of minority panelists. The prosecution used seven of its eighteen peremptory strikes to strike every prospective minority juror who reached the jury box. *See* PA 3a. The court ruled: "[T]hat is every juror that's been available for challenge that has been Hispanic and/or black has been challenged by The People. ... [¶] Clearly, then, that would show a pattern of exclusion ... of the minorities that have thus far hit the box .... " JA 305-06. As a result, no minority jurors sat on Ayala's jury, and in particular no jurors of Ayala's race (Hispanic). *See* JA 304 (defense counsel objected that the prosecution had "systematically used their challenges to bleach clean the box of people of minority persuasion"); JA 286 ("It would be our objection to the challenge and excusal of Mr. Macias and Mr. Ortiz. That is one hundred percent of the jurors of Hispanic extraction that have gotten in the jury box.").

The profusion of minority jurors in the jury pool is starkly disproportionate to the representation of minority jurors who sat on the jury – 18% versus 0%. These statistics, together with the prosecution's exercise of seven peremptory strikes against every minority juror available for challenge, indicate discriminatory intent, as "[h]appenstance is unlikely to produce this disparity." *Miller-El v. Cockrell*, 537 U.S. 322, 342 (2003). This is precisely the result that *Batson* sought to prevent. "More than a century ago, the Court decided that the State denies a ... defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded." *Batson*, 106

S. Ct. at 1716 (citing *Strauder v. West Virginia*, 100 U.S. 303 (1880)).

The Ninth Circuit provides a thorough 14-page analysis of the exclusion of several exemplary jurors of minority descent, demonstrating that even on the incomplete record, many of the prosecution's reasons appear false, discriminatory, or pretextual. PA 38a-51a. The State implies that the Ninth Circuit cherry-picked these few examples, ignoring that just one example is sufficient to demonstrate *Batson* error. *See Turner v. Marshall*, 121 F.3d 1248, 1254-55 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1178 (1998).

The Ninth Circuit examined the prosecution's reasons for striking minority panelist George S. The prosecutor stated that George S. had applied to be a police officer some years earlier and had been rejected. PA 39a n.17; JA 312. The Ninth Circuit noted that this reason applied equally to seated white juror Charles C. PA 39a n.17; JA 239-40. The prosecutor also offered that George S. had been a "holdout" juror on another case. PA 39a n.17; JA 312. The Ninth Circuit exposed this reason as false or pretextual, because George S. had not in fact been a "holdout" juror, but rather a dissenting juror on a civil case in which unanimity was not required. PA 39a n.17. Furthermore, seated white juror Ana L. indicated on her questionnaire that she probably would be a holdout juror, and the prosecution never used a peremptory strike on her. *See* JA 109 ("If I am selected as a Juror and all Jurors voted for the death penalty I probably would not be able to vote for the death penalty."). As another example, the prosecutor explained he struck minority panelist

Olanders D., because he lacked the "ability to fit in with a cohesive group of 12 people." PA 39a-40a; JA 283. The Ninth Circuit noted that the trial judge recognized this reason was pretextual, rejecting it outright. PA40a; JA 283-84. The prosecutor also offered that Olanders D.'s answers to voir dire questions were often not fully responsive. PA 39a-40a; JA 283. The Ninth Circuit reviewed the voir dire transcript to find exactly the opposite; the answers given by Olanders D. were "responsive and complete." PA 41a. Furthermore, there are additional pretextual reasons on record, which were not specifically discussed by the Ninth Circuit. For example, one of the prosecution's reasons for striking minority panelist Barbara S., was that Barbara S. appeared "somewhat angry." JA 314. The trial judge rejected this, stating that he did not detect any hostility. *See* JA 315.

The State counters the Ninth Circuit's analysis, arguing that the trial judge, who was in a position to observe the demeanor and manner of jurors and the prosecution, credited many of the prosecutions reasons. Petitioner's Br. pp. 44-54. The State misses the point. Irrespective of whether the prosecutor may have offered some reasons which appear legitimate, the fact that even the trial court exposed some of the prosecution's reasons as pretextual means Ayala likely would have prevailed, were he afforded his constitutional right to have defense counsel represent him at the hearings. As the Ninth Circuit explained:

> Notwithstanding the existence of some apparently appropriate reasons, "if a review of the record undermines ...

> *many* of the proffered reasons, the reasons may be deemed a pretext for racial discrimination." *Kesser v. Cambra*, 465 F.3d 351, 360 (9th Cir. 2006) (en banc) .... In short, "[a] court need not find all nonracial reasons pretextual in order to find racial discrimination" with respect to any particular juror, and the exclusion of any one juror in violation of *Batson* requires reversal of the verdict. *Id.*

PA 52a

Had Ayala's counsel been allowed to participate in the *Batson* hearings, they would have addressed at least the same issues the Ninth Circuit exposed. Furthermore, just as the trial court was in a position to observe the prosecution and the jurors first-hand, so too would defense counsel have been in that position.

The State forgets that the Ninth Circuit was not analyzing a simple *Batson* challenge to determine whether the record supports a claim that minority jurors were struck based on race. Rather, as the Ninth Circuit observed, this is a challenge to the *Batson* procedure. Thus, the purpose of the Ninth Circuit's analysis is to examine the likelihood that Ayala may have prevailed on any of his *Batson* objections, had the trial court followed a fair *Batson* procedure. This likelihood informed the Ninth Circuit's determination of prejudice. In light of the irremediably incomplete record, no reviewing court can make a fully informed decision as to whether Ayala should have prevailed on his *Batson* claim. The Ninth Circuit, along with any reviewing court

(including this Court), can only make a determination as to the likelihood that Ayala may have prevailed on a *Batson* claim.

Given that: the prosecution used 7 peremptory strikes to strike every prospective juror of minority descent who was available for challenge; no minority jurors sat Ayala's jury; the proportion of minority panelists in the jury pool was 18% and the proportion of minority jurors was 0%; many of the prosecution's reasons for striking minority panelists appear pretextual; and only 1 of the 7 peremptory strikes by the prosecution need be based on race in order for Ayala to prevail on his *Batson* claim, the only logical conclusion is that Ayala likely would have prevailed on his *Batson* claim, had he been given the opportunity to fully develop and present it, as the Ninth Circuit concluded.

The State's argument presumes that the Ninth Circuit found prejudice based solely on the analysis of the prosecution's stated reasons for striking some of the minority jurors. This is not at all the case. The Ninth Circuit found that "[t]he prejudice [Ayala] suffered was the deprivation of the opportunity to develop, present, and likely prevail on his *Batson* claim." The likelihood of prevailing on Ayala's *Batson* claim is only one factor of the Ninth Circuit's prejudice finding. The bulk of the prejudice was Ayala's preclusion from fully and properly developing and presenting his *Batson* claim. This prejudice stems from the exclusion of Ayala and his counsel from the *Batson* hearings which resulted in Ayala being deprived of: (1) rebuttal argument in response to the prosecution's proffered reasons for its strikes; (2) voir dire questioning aimed at rebutting

the prosecution's reasons; (3) a full and proper comparative juror analysis; and (4) an adequate record. In addition, all of this prejudice was exacerbated by the loss of 193 of the 214 juror questionnaires.

b. The State's Arguments for Deference Are Flawed and Hollow; the State is Really Requesting That This Court Second Guess the Ninth Circuit's Finding of Prejudice.

The State argues that deference should first be given to the trial court for its rulings that the prosecution's peremptory strikes were not race-based relying on two cases: *Hernandez v. New York*, 500 U.S. 352 (1991) and *Felkner v. Jackson*, 131 S. Ct. 1305 (2011). *See, e.g.*, Petitioner's Br., pp. 44, 48. This argument is flawed. In both of those cases, defense counsel participated in the *Batson* hearings. *See Hernandez*, 500 U.S. at 356-57; *Felkner*, 131 S. Ct. 1305, 1306 (2011). Here, no deference can be granted to the trial court, because Ayala's counsel was excluded from the *Batson* hearings, leaving the trial judge to assume "the role of defense counsel – inventing possible arguments as to why the prosecutor's stated reasons might not be sufficient – while at the same time keeping an open mind so as to rule on the motion impartially." *Thompson*, 827 F.2d at 1260. "That is not his normal role under our system of justice," and it was unreasonable for the trial court to assume this function. *Thompson*, 827 F.2d at 1260. As Chief Justice George pointed out in his dissent: "it is unrealistic to expect that a judge in the midst of trial will be able to pick out the discrepancies in a prosecutor's justifications,

especially where, as here, 70 panelists, whose questionnaires alone covered 77 questions ..., participated in the general voir dire." PA 257a.

The Ninth Circuit dealt decisively with the State's argument:

> [The State's argument] assumes, incorrectly, that we are confronting an ordinary *Batson* challenge on habeas review .... *Rice* [*v. Collins*, 546 U.S. 333 (2006)] and *Felkner* [*v. Jackson*, 131 S. Ct. 1305 (2011)] are precisely such cases. ... However, this case is not an ordinary *Batson* challenge, and for the reasons we have explained *supra* the [State's] approach is both inapplicable and wholly inappropriate. This ... is a case in which the challenge is to the procedure employed by the trial court in conducting the *Batson* inquiry – a procedure that resulted in the denial of a fair *Batson* hearing to the defendant. ...
>
> We cannot defer to the trial court where procedural error (such as the state supreme court found here and that the state concedes) has rendered the trial court's determination unreliable. Ayala's counsel was excluded from *Batson* stages two and three, thus depriving him of the opportunity to persuade the trial judge that the prosecutor was motivated by racial bias. Even a very capable trial judge may overlook or fail to understand the

> arguments supporting racial motivation "if unassisted by an advocate." *Thompson*, 827 F.2d at 1261. Because the procedures designed to ensure a fair hearing to the defendant were not followed, we cannot afford deference to the trial court's determination of the merits of the *Batson* claim. As we concluded in *Thompson*, we "cannot rely on ... such fundamentally flawed procedures to show that the defendant suffered no prejudice." *Id.* at 1261.

PA 68a-69a.

The State also incorrectly argues that deference to the trial court should be given pursuant to *Rushen v. Spain*, 464 U.S. 114 (1983). In *Rushen*, the issue was whether two unrecorded, ex parte conversations between the trial judge and a juror were prejudicial. *See id.* at 116-17. The trial judge held a post-trial hearing to remedy the error of the ex parte conversations, during which both the juror and the judge testified as to the content of the ex parte conversations. *See id.* at 116, 135 (dissenting opinion). There was no dispute concerning the content of the ex parte communications, and there was no contention that the post-trial hearing was inadequate to establish the historical facts necessary to resolve the issue before the court. *See id.* at 126 (concurring opinion). After the post-trial hearing, the trial judge ruled that the ex parte conversations were not prejudicial. *Id.* at 116. On habeas review, the *Rushen* Court deferred to the trial court's finding of no prejudice and upheld it.

Ayala's case is distinguishable from *Rushen*. In *Rushen*, this Court deferred to the trial court because: the trial court specially held a post-trial hearing to remedy the error; there was no dispute concerning the content of the ex parte communications; and there was no contention that the post-trial hearing was inadequate to establish the historical facts necessary. Here, we have none of those things. First, there was no post-trial hearing to attempt to remedy the exclusion of Ayala and his counsel from the *Batson* hearings. Second, there is great dispute as to the facts regarding Ayala's jury panelists. Third, the record is grossly insufficient to establish the historical facts, including the backgrounds and beliefs of the prospective jurors, necessary for any reviewing court to determine whether Ayala may have prevailed on any of his *Batson* objections.

The State also implies that the irremediably incomplete record in Ayala may be cured by deferring to the trial court based on *Rushen*. The State is again mistaken. In *Rushen*, all that was missing from the record were two ex parte conversations. Here the Court is missing: rebuttal argument in response to the prosecution's proffered reasons for its strikes; voir dire questioning aimed at rebutting the prosecution's reasons; a full and proper comparative juror analysis; and 193 of the 214 juror questionnaires. Moreover, in *Rushen*, the trial court held a hearing which cured the record of all missing information. In Ayala's case, no measures have been taken, nor can any be taken, to remedy the wealth of missing information. This is why Chief Justice George referred to the record as being "irremediably incomplete." PA 260a. The State's argument that

the irremediably incomplete record may be cured by deferring to the trial court would obviate Ayala's due process right to an adequate record, for if an irremediably incomplete record may be cured by deference, the due process right to an adequate record would serve no purpose. *See In re Winship*, 397 U.S. 358, 375 n.7 (1970) (concurring opinion, quoting *In re Gault*, 387 U.S. 1, 72 (1967)).

Relying on *Rice v. Collins*, 546 U.S. 333 (2006), the State raises the slightly different, but equally flawed, argument, that AEDPA deference should be given to the California Supreme Court, which upheld the trial court's findings that the prosecution's peremptory strikes were not race-based. *Rice*, too, is distinguishable.

First, as the Ninth Circuit fully explained, *Rice* considers an ordinary *Batson* challenge, in which the *Batson* procedure was fair. *See* PA 67a-70a. In Ayala's case, defense counsel was excluded from the *Batson* hearings, which necessarily makes them unfair and unreliable. *Strickland v. Washington*, 466 U.S. 668, 691-92 (1984) ("The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding.")

Second, the California Supreme Court upheld the trial court's findings based on an irremediably incomplete record. As *Thompson* held, and as California Chief Justice George reiterated in dissent:

> All we have before us concerning this issue is the prosecutor's explanation of her reasons and the district judge's

> ruling. ... However, if we are to review the district judge's decision, we cannot affirm simply because we are confident he must have known what he was doing. We can only serve our function when the record is clear as to the relevant facts, or when defense counsel fails to point out any such facts after learning of the prosecutor's reasons. [¶] Here, the record's silence cannot be reassuring.

827 F.2d at 1261; PA 249a-250a (George, C. J., dissenting). No court can credit the prosecutor's reasons for the peremptory strikes, because "the very reason ... the procedure [was] deficient is that, without defense counsel's participation, the transcript is likely to be incomplete or misleading, as it is in this case. The government cannot rely on a transcript reflecting such fundamentally flawed procedures to show that the defendant suffered no prejudice." *Thompson*, 827 F.2d at 1261; PA 254a (George, C. J., dissenting). "[T]he record here is irremediably incomplete; any perceived strength is illusory and cannot be relied upon." PA 260a (George, C. J., dissenting).

Third, the correct standard for assessing prejudice is *Brecht* – not AEDPA. Regardless, it would be unreasonable for the California Supreme Court to give deference to the trial court's unreliable rulings, and doubly unreasonable to uphold them based on the "irremediably incomplete" record. Moreover, the Ninth Circuit reviewed the California Supreme Court's prejudice finding and specifically

held it "to be an unreasonable application of *Chapman*." PA 32a n.13.

The State wrongly criticizes the application of *Brecht* in Ayala's case, because the Ninth Circuit applied *Brecht* "without regard for the state court's harmless determination." Petitioner's Br., pp. 41-42. This is not error – it is the precise approach dictated by *Fry*: "We hold that in § 2254 proceedings a court must assess the prejudicial impact of constitutional error in a state-court criminal trial under the 'substantial and injurious effect' standard set forth in *Brecht* ..., whether or not the state appellate court recognized the error and reviewed it for harmlessness under the 'harmless beyond a reasonable doubt' standard set forth in *Chapman*." 551 U.S. at 121-22 (emphasis added) (citations omitted). In any event, the Ninth Circuit did grant deference to the California Supreme Court's ruling, and the Ninth Circuit found that ruling to be wrong, in spite of the deference it was granted. "[W]e ... also hold to be an unreasonable application of *Chapman* the California Supreme Court's conclusion that Ayala was not prejudiced by the exclusion of the defense during *Batson* steps two and three or by the loss of the questionnaires." PA 32a n.13.

The Ninth Circuit's decision was well-reasoned:

> Here, it is probable that the state's errors precluded Ayala from turning what is a very plausible *Batson* claim – the challenge to the prosecution's strikes of all minority jurors – into a winning one by preventing defense counsel from performing the two

"crucial functions" we identified in [*Thompson*, 827 F.2d at 1260-61]. First, Ayala's counsel could have pointed out where the prosecution's purported justifications might be pretextual or indicate bad faith. ...

Second, Ayala's counsel could have "preserve[d] for the record, and possible appeal, crucial facts bearing on the judge's decision." *Thompson*, 827 F.2d at 1261. ...

This second deficiency is greatly augmented by the loss of the jury questionnaires. ... Thus, we cannot perform a fair comparative juror analysis as required by *Batson*. *See* [*Miller-El v. Dretke*, 545 U.S. 231, 241 (2005)].

Even so, we have substantial reason to question the motivation of the prosecution in engaging in its peremptory challenges of the black and Hispanic jurors. In conducting our inquiry, we must keep in mind the strength of Ayala's prima facie case. "[T]he statistical evidence alone raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors." [*Miller-El v. Cockrell*, 537 U.S. 322, 342 (2003)]. That the prosecution struck each of the seven black or Hispanic jurors available for challenge establishes a basis for significant doubt

> of its motives: "[h]appenstance is unlikely to produce this disparity." *Id.*

PA 35a-38a (footnotes omitted).

The unreasonableness of the California Supreme Court's harmless error decision is perhaps best evidenced by the fact that if this Court were now faced with reviewing the rejection of Ayala's *Batson* challenges made at his trial, the Court would be unable to do so because the record is "irremediably incomplete." This is especially so, as without the lost questionnaires, this Court would be unable to perform a full and fair comparative juror analysis per *Miller-El v. Dretke, supra*, 545 U.S. at 241. The Ninth Circuit agreed: "[B]ecause the defense was excluded from the *Batson* proceedings, the appellate courts reviewing this case cannot engage in a proper comparative juror analysis, or know what other facts and arguments might be employed to demonstrate that the proffered reasons were false, facially discriminatory, and pretextual." PA 52a. This prejudice is exacerbated by the loss of the juror questionnaires. *Id.*

The Ninth Circuit soundly concluded that "Ayala has met the *Brecht* standard. The prejudice he suffered was the deprivation of the opportunity to develop, present, and likely prevail on his *Batson* claim." PA 34a.

In addition to being flawed, the State's argument for deference is also hollow, because the State never explains how giving deference to the California Supreme Court would undermine the Ninth Circuit's finding of prejudice. Giving deference does nothing to allay the prejudice from

Ayala's deprivation of rebuttal argument in response to the prosecution's proffered reasons for its strikes. Giving deference does nothing to allay the prejudice from Ayala's deprivation of voir dire questioning aimed at rebutting the prosecution's reasons. Giving deference does nothing to allay the prejudice from Ayala's deprivation of a full and proper comparative juror analysis – an analysis, which is so important, that it is required by *Batson*. *Miller-El v. Dretke*, 545 U.S. at 241 and n.1. Giving deference does nothing to allay the prejudice of having an "irremediably incomplete" record. In short, giving deference does nothing to allay the prejudice from Ayala's deprivation of the opportunity to properly develop and present his *Batson* claim.

The State is masking a request that the Court second guess the Ninth Circuit by asserting that the Ninth Circuit incorrectly applied *Brecht*. The State simply dislikes the fact that when the Ninth Circuit considered the California Supreme Court's prejudice finding, the Ninth Circuit held the California Supreme Court's prejudice finding to be unreasonable. The State is really asking this Court to second guess the Ninth Circuit's decision that the California Supreme Court's prejudice finding was unreasonable, and that is not the proper function of this Court.

CONCLUSION

For at least the reasons stated above, Ayala respectfully requests that the Ninth Circuit's judgment be upheld.

Respectfully submitted,

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REPLY BRIEF

No. 13-1428

In The
Supreme Court of the United States

RON DAVIS, ACTING WARDEN,

Petitioner,

v.

HECTOR AYALA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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REPLY BRIEF FOR PETITIONER

I. A State Judgment Based on Harmlessness May Not Be Set Aside Unless the Habeas Petitioner Can Establish Underlying Legal Error as a Matter of Clearly Established Federal Law

The California Supreme Court resolved Ayala's federal constitutional claim by "scrutiniz[ing the record] closely," Pet. App. 207a n.3, and concluding that, "*if* federal error occurred, it . . . was harmless beyond a reasonable doubt," *id.* at 203a (emphasis added). As the State has explained (Br. 18-38), that decision was an "adjudicat[ion] on the merits," leading to a judgment that is subject, as a whole, to deferential federal habeas review under 28 U.S.C. § 2254(d). That conclusion follows from the statutory text (State Br. 20-25, 29-30); from the holding in *Mitchell* v. *Esparza*, 540 U.S. 12, 18 (2003), that a state harmlessness determination is entitled to AEDPA deference (Br. 23-24); and from the logic of this Court's decisions in *Harrington* v. *Richter*, 131 S. Ct. 770 (2011), and *Johnson* v. *Williams*, 133 S. Ct. 1088 (2013) (*Tara Williams*) (Br. 25-28, 30-31).

Ayala does not propose any alternate reading of the statutory text, or discuss *Mitchell*. The arguments he does advance are unpersuasive.

1. Ayala argues at length (Br. 20-25) that the California Supreme Court's opinion should be understood as having implicitly accepted his claim of federal error. That is both incorrect and beside the

point. The contrast between the state court's state-law and federal-law rulings is clear. As to state law, the court concluded "that error occurred." Pet. App. 203a. As to the parallel federal question, it held only that "*if* federal error occurred, it, too, was harmless." *Id.* (Emphasis added.)

That is the premise on which this Court granted review. *See* Pet. i. Contrary to Ayala's contention (Br. 22-23), it is not undercut by the state court's discussion of federal cases as part of its analysis. Pet. App. 201a-203a. Courts deciding novel issues frequently consider how courts in other jurisdictions applying their own laws have addressed a question; and it is hardly unusual for a court to discuss conflicting authority on a point before concluding that it need not resolve the issue to decide the case before it.

Nor is there merit to Ayala's contention (Br. 20-24) that *People* v. *Wheeler*, 22 Cal. 3d 258 (1978), California's state-law analog to *Batson* v. *Kentucky*, 476 U.S. 79 (1986), is more demanding than *Batson*, making it "'impossible that the California Supreme Court found no *Batson* error on the merits while finding *Wheeler* error.'" *Wheeler* at most requires a stronger defense showing at the prima facie stage.[1] Here, the prima facie stage is not at issue. The trial court required the prosecution to state reasons for its challenges and found that they were not racially

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[1] *See Johnson* v. *California*, 545 U.S. 162, 165, 173 (2005) (comparing *Batson* to *Wheeler*).

motivated. Regardless, comparing substantive prima facie case standards says nothing about how state and federal law compare as to the specific procedural issue of ex parte proffers.

2. As the State has explained (Br. 29-31; Pet. Reply 2-3), what a federal habeas court must defer to under AEDPA is the state judgment rejecting a federal claim – not any opinion the state court may have formed or expressed about any aspect of that claim. Ayala maintains (Br. 17-19, 33-37), to the contrary, that if the state court ruled only on harmlessness grounds, then the federal courts have no state "decision" on the underlying legal question to defer to, and may properly address that issue de novo. But where a federal claim has been "adjudicated on the merits" in state proceedings, § 2254(d) bars federal habeas relief unless the state "adjudication of the *claim* . . . resulted in a *decision* that was contrary to, or involved an unreasonable application of," federal law "clearly established" by this Court. (Emphasis added.) The "decision" resulting from adjudication of a "claim" is the state court's judgment granting or denying relief on that claim – not the particular reasoning supporting the judgment, which the state court may or may not explain. State Br. 29-30. Likewise, it is the judgment denying relief that may be set aside only if it is, as a whole, clearly contrary to federal law.

a. Ayala offers no alternative analysis of the statutory text. Instead, he relies principally (Br. 14, 17-19, 33-35, 42) on three cases in which this Court,

considering claims of ineffective assistance of counsel, addressed either the prejudice element or the inadequate performance element de novo, where the state courts had analyzed only the other element. California's opening brief (at 34-36) discusses those cases – *Wiggins* v. *Smith*, 539 U.S. 510 (2003), *Rompilla* v. *Beard*, 545 U.S. 374 (2005), and *Porter* v. *McCollum*, 558 U.S. 30 (2009) – in some detail. It points out that in those cases neither the parties nor the Court analyzed how AEDPA deference should be applied where the state courts had not addressed some issues, and so far as appears that question was not material to the outcome of the cases in this Court. Ayala does not contest these points, or explain why they should not affect the Court's consideration of the *Wiggins* cases here.[2]

As the State has also explained (Br. 25-29, 35-36), the Court's more recent opinion in *Richter* did directly consider how AEDPA deference should apply to multi-element claims. Like the *Wiggins* cases, *Richter* involved an ineffective-assistance claim, requiring the prisoner to establish both inadequate performance and resulting prejudice. 131 S. Ct. at 787. The state court rejected the claim without opinion. *Id.* at 783. In denying federal habeas relief,

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[2] The State's brief also explains (at 34-35 n.11) that *Cone* v. *Bell*, 556 U.S. 449 (2009), which Ayala cites in passing (Br. 33), applied de novo review not because the state court failed to address one element of a claim, but because it erroneously believed the claim procedurally barred and thus did not consider the merits at all.

this Court explained that § 2254(d) "refers only to a 'decision,' which resulted from an 'adjudication.'" *Id.* at 784. Based on that language, a federal court's AEDPA task of determining whether the state "decision resulted from an unreasonable legal or factual conclusion does not require that there be an opinion from the state court explaining the state court's reasoning." *Id.* Rather, the federal court must ask what "arguments or theories supported *or, as here, could have supported*, the state court's decision," *id.* at 786 (emphasis added) – a test that can be applied "whether or not the state court reveals which of the elements in a multipart claim it found insufficient," *id.* at 784.[3] To the extent that *Wiggins*, *Rompilla*, and *Porter* used a different approach, the Court should clarify that they have been superseded by the considered reasoning of *Richter*. Once a state court has rejected a federal claim on the merits (as opposed to invoking a procedural bar or simply overlooking the claim), AEDPA bars a federal habeas court from addressing any element of the claim de novo. *See Richter*, 131 S. Ct. at 784 ("§2254(d) applies when a 'claim,' not a component of one, has been adjudicated").[4]

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[3] *Cf. Jennings* v. *Stephens*, 135 S. Ct. 793, 799 (2015) ("This Court, like all federal appellate courts, does not review lower courts' opinions, but their *judgments*. . . . [A] rule . . . [making] the opinion part of the judgment [would be] peculiar.").

[4] *See also Hodges* v. *Colson*, 727 F.3d 517, 537 & n.5 (6th Cir. 2013) (following *Wiggins* approach under circuit precedent, but noting that it is illogical after *Richter*).

b. Ayala argues (Br. 35-37) that *Richter* and *Tara Williams* are inapposite here because they address situations in which a state court has denied relief "while being silent as to a federal claim," while in this case "the California Supreme Court was not silent as to Ayala's federal claim."

The State agrees the state court was not silent. It acknowledged Ayala's federal claim; discussed conflicting case law addressing the use of ex parte *Batson* proffers; and ultimately concluded that it did not need to resolve whether the use of such proffers was federal error in this case because, on the record before the court, any such error was harmless beyond a reasonable doubt. *See* Pet. App. 196a-211a. It thus rejected Ayala's claim "'as a matter[ ] of substance,'" not based on "'procedural details'" or "'technicalities.'" *Tara Williams*, 133 S. Ct. at 1097 (emphasis omitted). Its rejection was an "adjudicat[ion] on the merits," entitled to AEDPA deference.

Because the state court rejected Ayala's claim "on the merits," the logic of *Richter* and *Tara Williams* applies directly to this case. Under those decisions, a state court's rejection of a federal claim with no opinion, or with an opinion that addresses some claims but not the one later raised on federal habeas, will be accorded full AEDPA deference unless there is clear reason to conclude that the particular claim was either overlooked or rejected on some procedural, non-merits ground. *Richter*, 131 S. Ct. at 784-785; *Tara Williams*, 133 S. Ct. at 1094-1097.

Inevitably, in many such cases the state court will have rejected the federal claim after concluding only that it failed on one of several possible grounds. The court might conclude that the defendant could not satisfy one element of a multi-element test for establishing a claim. Or it might conclude, as here, that any error that might or might not have occurred was harmless in the context of the particular case. In either event, the court might conclude that some other aspects of the claim were or were not satisfied, or it might reach no conclusions. Under *Richter* and *Tara Williams*, none of these possibilities permits de novo federal habeas consideration.

Thus, if the state court has not explained its reasoning, a federal court may not set aside the state court judgment rejecting the claim unless the habeas petitioner can meet AEDPA's stringent requirements by establishing both a violation of law clearly established by this Court and the resulting prejudice required for relief. *See* State Br. 30-31. The necessary implication is that the deference AEDPA requires from federal courts is to the finality of the state court's judgment – not to its reasoning, which the court may not have articulated. There is no sound basis for treating the state judgment as having different consequences under AEDPA depending on whether the court chooses to explain all or part of its reasoning.

Indeed, doing so would create perverse incentives for state courts. *See* State Br. 27.[5]

3. Ayala also argues (Br. 26-33) that his federal claim rests on law that has been "clearly established" by this Court for purposes of AEDPA. That contention, which goes beyond the court of appeals' own reasoning, *see* Pet. App. 24a, cannot be sustained.[6]

As the California Supreme Court recognized, Pet. App. 198a, this Court expressly decided to "make no attempt to instruct . . . courts how best to implement" the principles of *Batson*. *Batson*, 476 U.S. at 99 n.24; *see Powers* v. *Ohio*, 499 U.S. 400, 416 (1991) ("[i]t remains for the trial courts to develop rules" implementing *Batson*). That should end the AEDPA inquiry. *Cf. Chaidez* v. *United States*, 133 S. Ct. 1103, 1108 (2013) (holding rule new and nonretroactive under *Teague* where, *inter alia*, it settled question

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[5] Focusing on the judgment also avoids any temptation for habeas courts to justify de novo review by seizing on stray statements that purportedly misstate a federal rule. *See, e.g.*, *Mann* v. *Ryan*, 774 F.3d 1203, 1223-1224 (9th Cir. 2014) (Kozinski, J., dissenting) (protesting that panel's reason for applying de novo review despite AEDPA "rests upon a single," "ambiguous phrase" "in [a] state court's opinion" that otherwise stated and applied the correct framework and arrived at a "plainly reasonable" result); *id.* ("After *Richter*, it seems clear that we should assess the reasonableness of a state court's decision, not its reasoning.").

[6] Indeed, as the State has pointed out (Br. 33 & n.10), the court of appeals' analysis under *Teague* v. *Lane*, 489 U.S. 288 (1989), implicitly concedes that this Court's cases (as opposed to circuit precedent) have never "clearly established" the *Batson* rule on which Ayala's claim depends. *See* Pet. App. 54a-60a.

that prior decisions "explicitly left open"). Conflicting lower court opinions reinforce the conclusion that the rule on which Ayala relies is not dictated by this Court's precedents.[7]

Invoking precedents establishing that criminal defendants have a Sixth Amendment right to the assistance of counsel at critical stages of criminal proceedings, Ayala argues (Br. 26-33) that ex parte *Batson* proffers violate the right to counsel. But arguments that require "'framing [this Court's] precedents at such a high level of generality'" do not satisfy AEDPA. *Lopez* v. *Smith*, 135 S. Ct. 1, 4 (2014); *see Richter*, 131 S. Ct. at 786 ("'The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.'"). Ayala had a right to, and received, the assistance of counsel during jury selection. Out of that extensive process, counsel was excluded from three colloquies where the prosecutor stated race-neutral reasons for challenging a handful of jurors, and where the trial court, based

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[7] *See United States* v. *Tucker*, 836 F.2d 334, 340 (7th Cir. 1988); *United States* v. *Davis*, 809 F.2d 1194, 1202 (6th Cir. 1987). Ayala contends (Br. 31 n.10) that *Tucker* and *Davis* recognized a rule against ex parte *Batson* proffers and applied a limited exception. In fact, *Tucker* refused to recognize *any* rule requiring adversarial proceedings. 836 F.2d at 340 ("we hold that it is up to the trial judge to decide"). Its discussion of rules and exceptions criticized the internal logic of a contrary Ninth Circuit opinion. *Id.* *Davis* similarly rejected any constitutional rule against ex parte proceedings. 809 F.2d at 1202 ("*Batson* does not require rebuttal of the Government's explanation by defense counsel," nor counsel's "participation . . . while the Government's explanations are being proffered").

on its own observation of the process, assessed the proffered reasons to determine whether they were credible. This Court has never held that such brief ex parte colloquies amount to the deprivation of counsel's assistance at jury selection as a whole. Because the general right to counsel does not "'squarely establish[ ]'" the "'specific legal rule'" on which Ayala's claim relies, it provides no basis for relief under AEDPA. *Richter*, 131 S. Ct. at 786; *see, e.g.*, *Wright* v. *Van Patten*, 552 U.S. 120 (2008) (no clearly established right is necessarily violated when defense counsel appears at guilty plea by speakerphone rather than in person).

4. Enforcing AEDPA's limitations on federal habeas review of claims on which state courts have denied relief does not amount to "'abdication.'" Ayala Br. 41. If this Court's precedents clearly established the unconstitutionality of ex parte *Batson* proffers, then federal habeas relief would be available so long as Ayala could establish prejudice. If the California Supreme Court had overlooked Ayala's federal claim, or relied on inadequate procedural grounds to avoid addressing it on the merits, then a federal habeas court could properly evaluate the claim de novo. *Tara Williams*, 133 S. Ct. at 1096-1097; *see, e.g.*, *Cone*, 556 U.S. at 466-467, 472. Here, however, the court of appeals reviewed Ayala's claim de novo even though the state Supreme Court had rejected it on substantive harmless-error grounds. It then granted relief even though no decision of this Court clearly establishes that there was any error in the first place. That approach and result cannot be reconciled with the

important but limited role that Congress has assigned to federal habeas review of state convictions: serving "as a guard against extreme malfunctions in the state criminal justice systems, and not as a means of error correction." *Greene* v. *Fisher*, 132 S. Ct. 38, 43 (2011) (internal quotation marks omitted).

II. The Court of Appeals Misapplied *Brecht*

The court of appeals also misapplied the "actual prejudice" requirement of *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993), in a way that cannot be reconciled with AEDPA. This is not a matter of the State "stubbornly refus[ing] to accept that *Brecht* is the correct standard." Ayala Br. 38. As the State's opening brief makes clear (at 38-43), the State does not question the holding or logic of *Fry* v. *Pliler*, 551 U.S. 112 (2007), in that regard. The State does question how the court of appeals applied *Brecht* in this case. In particular, *Fry* should not be understood as directing federal courts to assess the existence of "'substantial and injurious effect'" on federal habeas review "'without regard for'" a state court's previous determination of harmlessness beyond a reasonable doubt. Pet. App. 31a-32a.

1. The court of appeals rested its prejudice assessment on an analysis of three excused jurors. *See* State Br. 44-54. It concluded that if the prosecution had not been permitted to proceed ex parte in proffering its explanations for striking those three jurors, defense counsel likely could have

demonstrated that the explanations were pretexts for discrimination. Pet. App. 38a-52a. The State's opening brief explains (at 43-57) why that conclusion was based on speculation and conjecture that are insufficient to support setting aside a state conviction – especially in light of the considered contrary findings and judgments of the state trial and appellate courts.

Ayala offers specific arguments (Br. 46-47) as to three potential jurors, only one of whom was considered in detail by the court of appeals. As to George S. (whom the court discussed only in an equivocal footnote, Pet. App. 38a n.17), Ayala first suggests (Br. 46) that the prosecutor's stated concern about rejection of George S.'s earlier application to become a police officer is not credible because that circumstance "applied equally to seated white juror Charles C." Ayala's contention echoes the court of appeals' opinion, Pet. App. 38a n.17, but on the record the two situations were hardly "equal[ ]." George S. applied to law enforcement because he was "trying to get out of the Army" (J.A. 222), and the prosecutor, though not knowing for sure why he was rejected, "suspect[ed] perhaps some psychological aspects." J.A. 312. Charles C., who applied for a law enforcement job because it seemed like "interesting work" and "an improvement over what I was doing at the time," made clear that he passed the required examination but was ranked too far down on the list of some 800 qualified applicants to receive one of about 20 positions. J.A. 239.

Ayala also argues (Br. 46) that the prosecutor's concern that George S. had been a "holdout" juror on

another case must have been "false or pretextual" because the incident involved a dissenting vote in a civil case where unanimity was not required, and because "seated white juror Ana L. indicated on her questionnaire that she probably would be a holdout juror" too. But George S.'s prior willingness to "be[ ] . . . the one" in an "eleven-one decision" on a civil damages issue (J.A. 222) was a legitimate reason for concern – especially in a capital case, where a single dissent could prevent a guilt- or penalty-phase verdict (*see* J.A. 312). Moreover, although Ana L.'s questionnaire indicated she would not vote for the death penalty, at voir dire she explained, under pointed questioning (*see* J.A. 192-198, 201-204), that she had since "thought about it a great deal" (J.A. 194) and was now able to say positively that she would vote for death if in the end she felt it was the appropriate verdict (*e.g.*, J.A. 194, 203-204). Ana L. thus posed little risk of being a holdout. Indeed, her reflection leading to a firmly-expressed willingness to impose the death penalty could have made her an especially attractive juror for the prosecution.[8] In contrast, George S. in voir dire continued to voice serious reservations about his ability or willingness to impose a capital sentence, because doing so might

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[8] Ana L. also had previously served as a juror in a rape trial in which the defendant sought to escape from the courtroom after conviction. J.A. 204-206. And she approved of how police and prosecutors responded when she was a crime victim. J.A. 199-200. George S. had no comparable experiences.

conflict with his religious beliefs. J.A. 222-223; 22 RT 2107, 2110.

As to prospective jurors Olanders D. and Barbara S., Ayala claims (Br. 46-47) the federal court of appeals or the state trial court "recognized" that some reasons proffered by the prosecution for its strikes were "pretextual." But the court of appeals noted only that the trial judge "rejected" one of the prosecutor's stated concerns regarding Olanders D. – that he might not get along well with other jurors. Pet. App. 40a. The trial court stated its own view that D. might "get along very well with 12 people." J.A. 283-284; *see* State Br. 7, 52. But it affirmatively agreed that "the other observations of counsel [justifying the strike] [were] accurate and borne out by the record." J.A. 284. The court cast no doubt on the subjective sincerity of the prosecutor's differing assessment as to Olanders D.'s ability to get along with other jurors, and it certainly did not conclude that the prosecutor was seeking to conceal discrimination based on race. Similarly, while the trial judge thought that the demeanor of venire-member Barbara S. showed nervousness rather than "hostility," he agreed with the prosecutor's stated concern with her "incomplete" answers and "non sequiturs"; noted that he "certainly [could not] quarrel" with the prosecutor's "subjective impression"; and expressly found that the prosecutor's challenge of Barbara S. was "based upon her individual manifestation, as opposed to her ethnicity." *Compare* Ayala Br. 47 *with* J.A. 315. Even if "[r]easonable minds reviewing the record might disagree

. . . [,] on habeas review that does not suffice to supersede the trial court's credibility determination." *Rice* v. *Collins*, 546 U.S. 333, 341-342 (2006).

Ayala also argues (Br. 2, 44, 49) that the prosecution used seven of its 18 challenges to strike minority venire-members, and that the final jury had no minority members. But that provides no basis for finding that excluding defense counsel from the prosecutor's proffer changed the outcome. To the extent the figures by themselves might give rise to any concern, they were taken into account when the trial court relied on them as a basis for finding that the defense had made out a prima facie case under *Wheeler*, thus requiring the prosecution to explain the non-discriminatory reasons for its strikes. *See* J.A. 304-306. In this and other respects, this case bears no resemblance to the trial this Court considered in *Miller-El* v. *Cockrell*, 537 U.S. 322 (2003) (*Miller-El I*), and *Miller-El* v. *Dretke*, 545 U.S. 231 (2005) (*Miller-El II*) (cited at, *e.g.*, Ayala Br. 45). The trial at issue in the *Miller-El* cases occurred before *Batson*, and the trial judge made no contemporaneous credibility judgments concerning the prosecution's reasons for its challenges. *Miller-El II*, 545 U.S. at 241 n.1. Here, in contrast, the trial judge, after requiring the prosecution to articulate its non-discriminatory reasons, made express credibility determinations – which are entitled to "'great deference.'" *Felkner* v. *Jackson*, 131 S. Ct. 1305, 1307 (2011). Moreover, *Miller-El* involved not only challenges to a number of minority jurors but also a suspicious pattern of "jury shuffle[s],"

"graphic" questioning designed to elicit black venire-members hostility to the death penalty, "trick question[s]" designed to elicit answers that would subject minorities to other for-cause dismissals, and the prosecuting office's "formal policy" of "systematically excluding blacks from juries." *See Miller-El II*, 545 U.S. at 253, 255-256, 261-264. There is nothing comparable here. Overturning the trial court's assessment in this case was improper under AEDPA, because nothing in the record "compel[led] the conclusion that the trial court had no permissible alternative but to reject the prosecutor's race-neutral justifications and [find] a *Batson* violation." *Rice*, 546 U.S. at 341.

2. Ayala also argues more broadly (Br. 43-44, 48-59) that the court of appeals correctly concluded there was actual prejudice in this case because the exclusion of defense counsel from the prosecution's proffers, combined with loss of the questionnaires of non-seated venire-members, made the record "irremediably incomplete." As the State has explained (Br. 54-57), however, these concerns are insufficient to justify setting aside the state court's contrary judgment in this case.

Ayala claims, for example, that his counsel, if present at the prosecution's proffers, could have engaged in "rebuttal argument in response to the prosecution's proffered reasons for its strikes[, and] voir dire questioning aimed at rebutting the prosecution's reasons." Br. 49-50. Further voir dire for that purpose would, however, be unusual and irrelevant. Under *Batson* a trial court evaluates whether a prosecutor

has honestly articulated a non-discriminatory reason for a challenge based on what the prosecutor knew when the challenge was made – not whether the prosecutor's concerns could be dispelled by further inquiry. The court of appeals based its decision on speculation about arguments that defense counsel might conceivably have made if apprised of the prosecutor's stated reasoning, based on facts or circumstances that are not reflected in the current record but might perhaps have existed. *See* State Br. 46-55. That is not a sound basis for overturning a state harmlessness determination firmly based on what *is* in the record – including the experienced trial judge's repeated rulings endorsing most of the prosecutor's observations, and crediting all of them as proffered in good faith and not as pretexts for discrimination.

At its broadest, Ayala's position amounts to an argument that even the court of appeals rejected: that exclusion of counsel from *Batson* proffers is not susceptible to harmless-error analysis at all, because the reviewing court can never know what the record would have looked like if counsel had only had an opportunity to build and preserve it. *Compare*, *e.g.*, Ayala Br. 44, 54-55, *and* Pet. App. 35a-38a, 41a, 45a-46a, *with* Pet. App. 30a-31a. As this Court has repeatedly made clear, however, the class of "structural" errors that cannot be reviewed for harmlessness is "'very limited.'" *United States* v. *Marcus*, 560 U.S. 258, 263 (2010). The state judgment in this case cannot be set aside on a structural-error theory, because this Court has never "clearly established"

that this sort of error cannot be harmless. *See Wright*, 552 U.S. at 124-126 (error may not be treated as structural in AEDPA review unless that classification is itself "clearly established").

As to review on the present record, uncertainty about possible facts that were never developed is a common occurrence on appeal. (This is often true, for example, with ineffective-assistance claims.) Even the loss of some material that should be in the record is unfortunate but not unheard-of. Both sorts of gaps may be "irremediable," but they do not normally make it impossible for an appellate court to assess harmlessness fairly on the basis of the existing record. *See, e.g.*, *Rushen* v. *Spain*, 464 U.S. 114 (1983) (per curiam).[9] Here, the record contains thousands of pages of voir dire, hundreds of pages of questionnaires, and the contemporaneous evaluation of the prosecutor's proffered explanations and good faith by a respected trial judge who saw everything first-hand. *See* Pet. App. 209a-210a. The California

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[9] Ayala contends (Br. 53) that in *Rushen* "there was no contention that the post-trial hearing was inadequate to establish the historical facts necessary" for review. That is not correct. The post-trial hearing did not eliminate questions about the material facts. *See* 464 U.S. at 133 n.3 (Marshall, J., dissenting) (noting that trial judge's and juror's initial accounts of their meeting differed from accounts they later gave); *id.* at 140 n.20 (noting "flat[ ] inconsisten[cies]" between juror's voir dire statements and facts revealed in post-trial hearing). Even in the face of that disagreement, and even before AEDPA, this Court required deference on federal habeas to a state court's determination that the record was sufficient to establish harmlessness.

Supreme Court expressly considered the question and held that it had enough before it to reach a confident conclusion that any federal error in the *Batson* process was harmless beyond a reasonable doubt. *Id.* at 207a-211a. Neither Ayala nor the court of appeals has provided any sufficient, non-speculative reason for a federal court to override that judgment.

3. Finally, Ayala defends (Br. 56) the court of appeals' decision to apply *Brecht* "'without regard for the state court's harmlessness determination,'" Pet. App. 31a-32a, on the ground that that approach is "dictated by" this Court's decision in *Fry* v. *Pliler*. But as the State has explained (Br. 40-41), *Fry*'s statement that *Brecht* applies "whether or not the state appellate court recognized the error and reviewed it for harmlessness under . . . *Chapman*" (551 U.S. at 121-122) addressed a particular context. The Court was rejecting the prisoner's claim that where a state court had not analyzed harmlessness under the federal *Chapman* standard, the federal habeas court should itself apply *Chapman*'s "beyond a reasonable doubt" standard in the first instance. *Fry* thus rejected an attempt to apply a standard that would have been less deferential to the state court's judgment than the pre-AEDPA *Brecht* standard. Nothing in the opinion suggests any retreat from the principle that state-court judgments based on harmlessness are to be accorded AEDPA deference – not ignored. *See Fry*, 551 U.S. at 119 (reaffirming *Mitchell* v. *Esparza* and observing that "AEDPA limited rather than expanded the availability of habeas relief");

id. at 117 (acknowledging interest in finality, need to protect state "sovereignty over criminal matters," and need to limit habeas beneficiaries "to those grievously wronged" (internal quotation marks omitted)); State Br. 40-41.

Fry observed that it "makes no sense to require formal application of *both* tests (AEDPA/*Chapman* and *Brecht*) when the latter obviously subsumes the former." 551 U.S. at 120. That statement simply underscores that, in cases under § 2254(d), *Brecht* must be applied in a manner that *in fact* subsumes deferential AEDPA review of a state court's prior judgment based on harmlessness. Where the state court has explained its reasons for concluding that any error was harmless, a federal court can comply with *Fry* either by assessing whether the state court's analysis was unreasonable under AEDPA, or by considering whether the record establishes actual prejudice under *Brecht*. One approach or the other may be more efficient in a particular case. But all agree that if a state court opinion addressing harmlessness is not unreasonable, then as a logical matter there can be no prejudice under *Brecht*. *See* Ayala Br. 38; Pet. App. 32a n.13. If a state court's harmlessness determination could be accepted by fairminded jurists, then a federal court may not set aside the resulting state judgment under *Brecht*, *Fry*, or § 2254(d).

Here, the California Supreme Court, mindful of its "oblig[ation] to scrutinize [the record] closely," carefully analyzed the harmlessness question as to all seven of the prosecution challenges questioned by the

defense. Pet. App. 203a-211a & n.3.[10] Observing that the trial judge had "showed himself to be in command of the law and the facts" and was "diligent, prepared, knowledgeable, and engaged in the proceedings," *id.* at 210a, the court paid close attention to instances in which he had agreed with the prosecutor's observations, and others in which he had somewhat different impressions of the prospective jurors but nonetheless found no sign of pretext or bias underlying the prosecutor's decisions.[11] This review left the court "confident that the challenged jurors were excluded for proper, race-neutral reasons," *id.* at 203a, and "that defense counsel's presence could not have affected the outcome," *id.* at 207a. Moreover, the court specifically considered and rejected Ayala's contentions that the exclusion of defense counsel from the *Batson* proffer sessions or the loss of non-seated-juror questionnaires

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[10] In contrast, the court of appeals analyzed only three challenges in depth, Pet. App. 39a-51a, and a fourth in a footnote, *id.* at 38a n.17. As to the remaining three the court simply asserted that "race may also have played a substantial role." Pet. App. 38a n.17. *Cf. Felkner*, 131 S. Ct. at 1307 (reversing, under AEDPA, where federal court asserted, without explanation, that comparably situated jurors had been treated differently and that the prosecutor's explanations were insufficient under *Batson*).

[11] *Compare, e.g.*, Pet. App. 204a ("The trial court agreed [with the prosecutor], commenting on Galileo S.'s 'paranoia . . . concerning the justice system' "), *with id.* at 203a (trial court "disagreed" with prosecutor's prediction of how Olanders D. might get along with others, but agreed that his other observations were " 'accurate and borne out by the record' ").

made it impossible to do a fair assessment of harmlessness on the existing record. *Id.* at 208a-211a.

Ayala, like the court of appeals, would come to different conclusions. But neither he nor the decision below offers any serious argument for concluding that the state court's analysis and conclusions are *unreasonable* – even in ordinary terms, let alone in the special AEDPA sense. *See, e.g.*, *White* v. *Woodall*, 134 S. Ct. 1697, 1702 (2014) (to qualify as "unreasonable" under § 2254(d)(1), state court application of Supreme Court holding "must be objectively unreasonable, not merely wrong; even 'clear error' will not suffice" (some internal quotation marks omitted)); *Richter*, 131 S. Ct. at 786-787 (AEDPA requires "that the state court's ruling . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement"). Under AEDPA, that should have made for an easy end to the matter on federal habeas review. *See, e.g.*, *Rice*, 546 U.S. at 335 (reversing grant of habeas on *Batson* claim where decision below "set aside reasonable state-court determinations of fact in favor of [the federal court's] own debatable interpretation of the record").

As with the question of how federal habeas courts must review the legal elements of a federal claim, the State's position on review of harmlessness determinations is not an argument for "surrender[ing] all inquiry" or for the "'abandonment or abdication of judicial review.'" Ayala Br. 41. If a state court judgment based on harmlessness could not be defended by

fairminded jurists, that would be an "'extreme malfunction[]'" that a federal habeas court would be authorized to correct. *Richter*, 131 S. Ct. at 786. The standard for determining when such intervention is authorized "is difficult to meet," however, "because it was meant to be." *Id.* In all other circumstances, responsibility for assessing harmlessness with respect to claims of federal error in state criminal cases is properly entrusted to the state courts, overseen on direct appeal through this Court's certiorari jurisdiction. That is no more an "abdication" than is the application of § 2254(d) to any other aspect of a prisoner's claim. It is simply part of "ensur[ing] that state proceedings are the central process, not just a preliminary step for a later federal habeas proceeding." *Id.* at 787.

Indeed, it is ironic that Ayala ends by complaining (Br. 59) that the State is "asking this Court to second guess the Ninth Circuit's decision" with respect to prejudice. What the State seeks is clarification and enforcement of AEDPA limits that, as this Court has explained, Congress imposed in order to "prevent[] defendants – and federal courts – from using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts." *Renico* v. *Lett*, 559 U.S. 766, 779 (2010). The clarity with which the record in this case reveals transgression of those limits may account for this Court's decision, in granting certiorari, to direct the parties to brief and argue what is now the second question presented: "Whether the court of appeals properly applied the standard

articulated in *Brecht* v. *Abrahamson*[.]" 10/20/14 Order List 2. As the State has demonstrated, the answer to that question is "no."

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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